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REPORTS

OF

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

STATE OF MISSOURI,

FROM 1843 TO 1845.

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BY S. M. BAY,

ATTORNEY-GENERAL, AND, EX OFFICIO, REPORTER.

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JUDGES
OF THE
SUPREME COURT OF THE STATE OF MISSOURI,
DURING THE TIME OF THE EIGHTH VOLUME OF THESE REPORTS.

HON. GEORGE TOMPKINS, PRESIDING JUSTICE.

HON. WILLIAM BARCLAY NAPTON.

HON. WILLIAM SCOTT.

ATTORNEY-GENERAL,
SAMUEL MANSFIELD BAY.

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DECISIONS
OF THE
SUPREME COURT OF MISSOURI,
AT
JULY TERM, 1843.

WILSON, by his next friend, *vs.* COCKRILL.

A. gave to B., his granddaughter, certain slaves, and to C., his grandson, certain other slaves. The instrument of the gift was a deed, providing, that if either the said B. or C. should "*die without heirs*," then the property of the one so dying should absolutely vest in the other. B. died without leaving any children: *Held*, that the gift was an entire disposition of the property of the donor in the slaves, and that the limitation over, being to take effect after such disposition, was void.

Quare—Whether the limitation over would have been valid had the same been created by will, or conveyance under the statute of uses.

APPEAL from Howard Circuit Court.

LEONARD, *for Appellant.*

The record presents two general questions for the consideration of this Court:

First, Did the grantor intend that the appellant, William Wilson, should take any, and if so, what interest in the slaves, in the event that has happened?

Second, Do the rules of law prohibit such an interest as was contemplated by the grantor, from being created in personal property, by a conveyance *inter vivos*?

First Question:

This is a pure question of intention, and for the appellant it is insisted—

1st: The plain intention of the grantor, as manifested by the deed, uncontrolled by technical rules of construction, was to give the particular slaves designated to his granddaughter, Juliet Wilson, forever, determinable, however, upon her dying in the life-time of her brother William, without children living at the time of her death; and in the event of her so dying, then over to her brother absolutely; and that the same limitation should prevail in relation to the slaves given in the first place to his grandson, the appellant.—Parkhurst *vs.* Smith, Willes' Rep. 332; 2 Blackstone's Com., 379; Preston's Touchstone, vol. 1, 170-176; Law Library, number for Nov., 1840, 170 and 179.

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2d: There is no rule of law requiring the court to give, in this case, such a technical construction to the word "heirs," or the expression, "if either shall die without heirs," as will defeat the real intention of the grantor.

The word "heirs" may, and, if the intent be manifest, must be construed "children."—*Fearne on Cont. Rem.*, 467, (side-paging); *Tyte vs. Willis*, Cas. Temp. Talb., 1; *Morgan vs. Griffith*, Cowp. Rep., 234; *Moffatt's Executors vs. Strong*, 10 John. Rep., 12; 4 Cruise's Dig. on Real Prop., title 32, ch. 21, sec. 25, 26, and 27; *Plond*, 53 and 541; *Beck's case*, Lit. Rep., 344; *Leigh vs. Brace*, 5 Mod. Rep., 266; 1 Ld. Raym., 101.

In dispositions of personal property, the words, "die without children, or issue," or other equivalent words, are interpreted to import a dying without children living at the death of the first taker, and not an indefinite failure of issue.—*Forth vs. Chapman*, 1 P. Wil., 663; *Kerby vs. Fowler*, 6 Bro. P. C., 309; *Wilmot's Opinions*, 308, 309 and 314, (cited in 16 John. Rep., 386); 2 Ves., sen., 180; 2 Atk., 288; *Crook vs. De Vandes*, 9 Ves., jun., 196; *Dew vs. Spenton*, Cowp., 410; *Goodtitle vs. Pegden*, 2 T. Rep., 720; *Atkinson vs. Hutchison*, 3 P. Wil., 258 and note 1; *Brasheur vs. Macy*, 3 J. J. Marshall, 91; *Rathbone vs. Dychman*, 3 Paige Rep.; *Moseby's Adm. vs. Corbin's Adm.*, 3 J. J. Marshall, 289; *Moore's Trustees vs. Howe's Heirs*, 4 Mon. Rep., 202; 4 Kent's Com. (fourth edition), 281; *Hawley and Another vs. Northampton*, 8 Mass. Rep., 39; *Targett vs. Grant*, Gil. Eg. Rep., 149; *Atkinson vs. Hutchison*, 3 P. Wil., 258.

The New York courts have given the same construction, even when applied to real property.—*Anderson vs. Jackson*, 16 John. Rep., 382, (same case); *Fosdick vs. Cornell*, 1 John. Rep., 440; *Jackson vs. Blansham*, 3 John. Rep., 189; *Jackson vs. Staats*, 11 John. Rep., 337; *Anderson vs. Jackson*, 16 John. Rep., 382, (same case); *Jackson vs. Chew*, 12 Wheat, 153.

Even where the expression is construed to mean an indefinite failure of issue, very slight circumstances are seized hold of by the courts to give the words their natural meaning.—*Pells vs. Brown*, Cro. Jac., 590; "Ewing, William," (*Porter vs. Bradley*, 3 T. Rep., 143,) "leaving no issue behind him:" *Roe vs. Jeffry*, 7 T. Rep., 589; "should depart this life and leave no issue:" *Dunn vs. Bray*, 1 Call, 388; "should die and leave no issue:" *Timberlake & Wife vs. Graves*, 6 Munf., 174; "to I. A. and his heirs forever, but if he die without heir, then to be divided between two sisters of I. A.:" *Gresham vs. Gresham*, 6 Mun. Rep., 187, "to his brother I., and in case he died without issue, to A. and B. (his brother's children):" *Didlake vs. Hooper*, Gil. Rep., 194; "if he die without issue, I give the whole of the property that I have lent him to S. and I.:" *James vs. McWilliams*; "to two daughters, provided, if either die without lawful issue, her part to go to the other:" *Cordle's Adm. vs. Cordle's Adm.*, 6 Munf., 455; "to two sons, and if either die without lawful heir, the surviving brother to inherit the estate of the deceased:" 1 Tucker's Com., 164, 165.

And so, if the general rule be adopted and applied to the construction of this deed, there is enough on the face of it to confine the want of issue to the time of the death of the first taker.—See cases last above cited.

The rule, that the same words which, when applied to a disposition of real estate,

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create an estate tail, will, when applied to personal property, vest the absolute interest in the first taker, does not apply to the words, "dying without issue," or other equivalent words, that only create an estate tail by implication.—*Atkinson vs. Hutchison*, 3 P. Wil., 259.

In England, (1 Victoria, c. 26); Virginia, (Statutes of 1819), Mississippi, (Rev. Code, 1824,) and other States of this Union, the unnatural judicial construction of the words, "dying without issue," has been repealed by express statutes on the subject, and the words restored to their natural meaning.—4 Kent's Com., (fourth edition), 278, 279.

Second Question:

First, There is no rule of law prohibiting the existence of such a contingent interest in personal property as the grantor intended to vest in the appellant in the present instance.—2 Chitty's Black. Com., 398; 2 Kent's Com., (4th edit.), 352; *Higginbotham vs. Rucker*, 2 Call's Rep., 313; *Powell vs. Brown*, 1 Bailey's S.C. Rep., 100; *Moffatt's Executors vs. Strong*, 10 John. Rep., 12; *Smith vs. Bell*, 6 Peter's Rep., 72.

Second, Or prohibiting the creation of such an interest by a disposition *inter vivos*.—*Higginbotham vs. Rucker*, 2 Call's Rep., 313; *Keen & West, vs. Macy*, 3 Bibb. Rep., 39; *Wright vs. Cartright*, 1 Bur. Rep., 102; *Powell vs. Brown*, 1 Bailey's S. C. Rep., 100; (cited in note in 2 Kent's Com., 362, fourth edition.)

DAVIS, TODD, and KIRTLEY, for Appellee.

The defendant relies upon the following points, to sustain the opinion of the Circuit Court.

First, The word "heirs," as used in the deed of gift, cannot be restricted by parol evidence to mean heirs of the body, or issue.

Upon this point, see the following authorities, to wit: 3 J. J. Marshall, 238; 1 Phillips' Ev., 480; 3 Starkie on Ev., title, "Parol Evidence," 996, and cases there cited; *Lane vs. Price*, 5 Mo. Rep., 101.

Parol evidence cannot be received, to change the legal effect of the deed.—See 3 Starkie, 1011.

Second, Whether the word "heirs," as used in the deed, is to have its usual and legal signification, or is to mean issue of the body of Juliet, the limitation over to the plaintiff is void absolutely.

No such limitation of personal property, by deed, ever was allowed to be good at common law.—See *Betty vs. Moore*, 1 Dana's Ky. Rep., 235.

That case was a gift of a slave, conditioned that the slave revert to the donor if the donee die without children; and the condition held to be void and the gift absolute; and that case was decided upon the authorities following, to wit: 3 Coke on Littleton, 20; a note, 120; 2 Black. Com., 112 and 398; *Roper on Legacies*, 204; *Fearne on Remainders*, 460; also, see pages of same, 445, 471, 478 and 482.—And,

Thirdly, If the word "heirs," as used in the deed, is construed to mean issue of the body of Juliet, it is then an estate-tail general which she takes in the slaves, and by the rules of the common law she is vested with the absolute property in the slaves, as no remainder ever could be limited after an estate-tail in personal

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property.—See 2 Black. Com., 113, and note 7 at that page, where it is declared, that after such a gift or grant, either by deed or will, the first taker becomes vested with the absolute property, and that all subsequent limitations are null and void: see also 2 Kent's Com., 286; 6 Cond. Peter's Sup. Court Decisions, 651; Williamson et al. vs. Daniel et al.; Fearn on Remainders, 463, and authorities there cited.

The gift to Juliet was a fee conditional at common law, if the natural meaning of the word "heirs" is to be restricted to mean "issue of her body," which by the statute *de donis* makes it an estate-tail, which the Virginia statute converts into an absolute estate in fee-simple.—See Griffith vs. Thompson, 1 Leigh's Va. Rep., 321; 3 Leigh's Va. Rep., 106; Calava Bryant et al. vs. Pope.—The case of Griffith vs. Thompson, by the Court of Appeals of Virginia, in 1829, was relative to a remainder in slaves limited to take effect after a dying without issue, (by will), and in that case all the cases are reviewed, and the result is, that even by will, a remainder which may not take effect within a life or lives in being twenty-one years and about ten months thereafter, never was allowed by the policy of the law, and that wherever it appears by the will that the event upon which the remainder is limited to take effect may not happen within the period above-mentioned, that then the limitation is void in its creation, and the absolute property is in the first taker. See, also, Fearn on Remainders, 445.—That "a dying without issue" is settled in England and the United States to mean an indefinite failure of issue, see Fearn, and the authorities above cited.

Additional authorities on first point:—

Watson et al. vs. Boylston, 5 Mass. Rep., 416: "For as there will be no latent ambiguity in the deed, the averment of extraneous matter will tend not to *explain*, but to *control* that instrument which cannot be admitted."—Same case: "But we can judge of his intent only by his language. The words of the deed are his own;" 418.

5 Mass. Rep., 93; Revere vs. Leonard: "And that it was against every legal principle to go out of the deed itself, by an inquiry into existing facts, to ascertain the meaning of *those* and *such like* words, there being in them no ambiguity of any kind; that what their meaning is was merely a question of law, of which the court are to judge by the words themselves."

5 Mass. Rep., Payne vs. McIntire, 69: "Parol evidence is inadmissible to *explain* a deed, unless it contain some *latent ambiguity*."

7 Mass. Rep., King vs. King, 500: "As to the motion for the admission of parol evidence to control or aid in the construction, the court are unanimous in the opinion, that it was justly overruled at the trial. The evidence, if admitted, must have been employed upon a question of legal construction and operation of a written contract expressed without any reference to extraneous circumstances, or any latent ambiguity."

6 Mass. Rep., 440; Storer vs. Freeman: "Unquestionably he could give no parol evidence either to contradict the deeds, or to explain any patent ambiguities."

8 Mass. Rep., Albee vs. Ward, 83: "For it is a well-known rule of law, that parol evidence is not admissible to vary the meaning of a deed, or to explain that which is apparent upon the face of it."

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8 Mass. Rep., *Townsend vs. Weld*, 147: "This was an attempt to control the effect of a written and sealed instrument by parol evidence, which is never permitted."

Scott, J., delivered the opinion of the Court.

This was an action of replevin, instituted by the appellant, plaintiff, against the appellee, defendant, for a slave named Sally, in which the appellant submitted to a nonsuit, and, after a refusal by the court below to set aside, appealed to this Court.

It appears that Micajah Woods, in consideration of the love and affection which he bore his grand-children, Juliet Walker Wilson and William Henry Wilson, gave unto the said Juliet W. Wilson, her executors, administrators, and assigns, one negro woman, Malinda, and three of her children, one boy, Allen, and two girls, Sally Anderson and Mary Ann; and in like manner he gave to William H. Wilson three other children of the above-named woman Malinda, viz., one girl, Queen, and two boys, Alexander and Reuben; to have and to hold the said negroes unto them, the said Juliet W. and William H. Wilson, their executors, administrators, and assigns forever: but should either the said Juliet W. or William H. Wilson die without heirs, then the property of the one so dying shall absolutely vest in the other. The instrument of the gift was a deed. The appellant is one of the donees mentioned in the deed. Juliet W. Wilson, the other donee, intermarried with Alfred Mann, and after being delivered of a dead child, died herself in child-bed, leaving no children. The slave Sally, for which the suit was instituted, is the same named in the deed of gift, and given to Juliet W. Wilson. Mann, after his marriage, and before the death of his wife, sold the said slave to the appellee, Cockrill.

Micajah Woods, the donor, was a resident of Albemarle county, Virginia, and executed the deed of gift to his grand-children on the eve of their departure from his home, where they had lived since the death of their mother. They left their grandfather's house for the purpose of coming to this State, where their father had resided for a number of years, and by whom they were sent for.

On one part it was maintained, that the appellant, the surviving donee, was entitled to the slave in dispute, by virtue of that clause in the deed of gift which provides, that, if either the said Juliet W. Wilson or William H. Wilson shall die without heirs, then the property of the one so dying shall vest absolutely in the other.

On the other hand it was contended, that the limitation over, being after an indefinite failure of heirs, was too remote, and therefore void; consequently, that the entire property in the slaves vested in the first taker: that if the limitation over was not too remote, and could be construed so as to bring it within the period the law allows an estate to vest, viz., a life or lives in being twenty-one years and some months, yet such contingent interests can only be created by a will or conveyance under the statute of uses, and not by a common law conveyance.

It was a principle of the common law, that no person but the feoffor, or grantor, and his heirs could take advantage of the breach of an express condition or conditions created by deed; hence, if a freehold estate be conveyed to one, and words

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of condition be used, and there be a limitation over to a third person, in case the condition be broken, yet upon breach of the condition, the feoffor, or grantor, or his heirs must enter, in order to avoid the estate: for whatever estate was created by livery could only be defeated by entry, and to permit him, the commencement of whose estate depended upon a breach of the condition, to enter, in order to take advantage of it, was allowing the assignment of a chose in action, which, for the purpose of preventing maintainance and oppression, the common law forbade. It was also a rule, that when the feoffor, or grantor, entered to take advantage of a breach of a condition, his entry defeated the livery made at the commencement of the estate, and all subsequent estates depending on the first were thereby defeated and gone: hence the principle, that a remainder, properly so called, cannot be limited by a common law conveyance to take effect upon a condition which is to defeat the particular estate. Inasmuch as such limitations were, however, found exceedingly convenient in making provisions for families, they were afterwards allowed, when created by will or conveyance under the statute of uses, by the denomination of executory devises and conditional limitations.

The authorities are all united in declaring that interests similar to that claimed by the appellant in the slave in controversy, which is a remainder limited to take effect after a disposal of the entire property in the thing by the grantor, can only be created by a conveyance operating under the statute of uses, or by will. (4 Kent, 128; Fearne, 10, 391; Tucker's Com., 90, 144.) Judge Tucker remarks, that Blackstone, vol. 2, pp. 155, 6, puts the case of a conditional limitation by a common law conveyance, and cites *Fry vs. Porter*, Ventris, 202, as an authority in support of such a mode of limitation; but he observes, all the elementary writers state the case as a devise, and Kent refers to the same case as an authority for the position, that conditional limitations, though not valid in the old conveyance at common law, yet within certain limits they are good in wills and conveyances to uses.

It was insisted by the appellant, that the intention of the grantor was to give the slaves to Juliet W. Wilson forever, but if she died without leaving children at her death, then they should go to the appellant, if he survived.

It may be admitted, that such was the intention of the grantor. When a donor has such an intent, and wishes to have it effected, the law has prescribed particular modes or forms in which that intent must be expressed, otherwise it cannot be regarded. The grantor by deed gave an absolute interest in property to one, and after thus parting with all his estate, wished to give a right to the same property to another, upon the happening of a certain event. That wish, in order to be carried into effect by the courts of law, must be expressed in one of two modes. The grantor has not adopted either of the modes required by law; his intentions, therefore, cannot prevail.—*Betty vs. Moore*, 1 Dana, is a direct authority upon this point.

Butler says, (Thomas' Coke, 2d vol., p. 761, 2,) "Executory devises originated in the indulgence shown to testators in effectuating their intentions, whereby the judges were induced, in cases of wills, as well as in limitations of uses, to dispense with the strict rules of the common law, according to which no remainder could be limited over after an estate in fee-simple, nor a freehold be created to commence in future: an executory devise or bequest is, therefore, such a limitation of a

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future estate, or interest in lands or chattels, as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law."

In the case of *Jackson vs. Anderson*, (16 I. Rep.,) the principle is stated, that in construing limitations, we are to look at the words of the instrument by which they are limited, and no circumstance transpiring subsequently affecting the limiters is to have any weight in ascertaining their validity. If, by the words of their creation, they may possibly endure forever, they are considered as estates in fee, though in fact they may terminate in less time than a life in being. If the limitation over to William H. Wilson be tested by this rule, it is impossible to say that Juliet W. Wilson did not take an estate in the slaves which might endure forever, consequently it was an estate granted after the disposal of the grantor's entire interest in the property, and therefore could not be made by deed or conveyance at common law.

Not one of the many cases produced in support of the claim of the appellant, except the case of *Higginbotham vs. Rucker*, (2 Cull,) arose on the construction of a common law conveyance. The limitations in all of them were by will or conveyance under the statute of uses. The question did not arise in the case of *Higginbotham vs. Rucker*, if the limitation in that case was made by deed; and so we may infer, from the report of it, the objection was not made, and no opinion was expressed in relation to it. The other cases cited by the appellant, to show that such an interest as he claims in the slave in dispute may be created by a common law conveyance, or, which is the same thing, by deed,—*Keene & West, vs. Macy*, 3 Bibb, 39; *Wright vs. Cartright*, 1 Burr, 162; *Powell vs. Brown*, 1 Bailey's S. C. Rep., 100,—are authorities in support of the principle, that chattels may be limited by deed to one for life with remainder over to another, and the limitation over, after the life-interest in the chattel has expired, is good. By the ancient common law, there could be no limitation over of a chattel, but the gift for life carried the entire interest. This rule was relaxed at first in favor of wills, and afterwards such limitations were permitted by deed.

We do not wish to be understood as expressing the opinion, that the limitation over to the appellant would have been valid had the same been created by will or conveyance under the statute of uses: conceiving that the question does not arise, we express no opinion in relation to it.

We are not clear, under the circumstances stated in the record, that the validity of the limitation contained in the deed should be determined by the laws of Virginia.

Even should the laws of that State govern us in ascertaining whether it is allowable or not, the counsel of the appellant did not maintain that they are different from those which prevail in this State.

The doctrine, as established in New York and Massachusetts, is, that the courts will not take judicial cognizance of any of the laws of our sister States at variance with the common law, but upon common law questions, the legal presumption is, that the common law of a sister State is similar to that of our own.—10 Wind., 75; *Holmes vs. Broughton*.

Judgment affirmed.

Note.—This case was argued at Boonville at the Fall term, 1842. Judge Napton, in consequence of indisposition, was absent from the bench.

Wilson, by his next friend, vs. Mann.—Hickerson vs. Benson & Workman

WILSON, by his next friend, vs. MANN.

APPEAL from Howard Circuit Court.

LEONARD, for Appellant.

DAVIS, TODD, and KIRTLEY, for Appellee.

SCOTT, J., delivered the opinion of the Court.

This cause is, in all respects, similar to that of Wilson, by his next friend, vs. Cockrill, decided at this term, and the judgment of the Circuit Court is, consequently, affirmed.

HICKERSON vs. BENSON & WORKMAN.

1. A wager on the result of an election authorised by law is not within the meaning of the statute concerning "Gaming," (R. S. 1835, p. 290,) but such a wager is contrary to public policy and sound morality, and is therefore void.
2. Where such a wager is lost, and the money or property has been fairly paid or delivered, action will not lie to recover back the same; but either party may rescind the contract, before the event is known on which the wager depended.

CLARK and BELT, for Plaintiffs in Error.

1. Verdict was found without sufficient evidence, and court erred in refusing to grant new trial.—See evidence in bill of exceptions.
2. Court improperly refused second instruction asked by plaintiff, that betting upon Presidential election is against our statute of gaming.—Rev. Code, 1835, p. 290, sec. 1, 3; 4 Mo. Rep., 536, *Shropshire vs. Glascock & Garner*; 4 Mo. Rep., 599, *Boyn-ton vs. Curle*, and authorities cited.
3. Court improperly refused, and erred in refusing fourth instruction asked by plaintiff, that a bet on the Presidential election is void.—*Bush vs. Keeler*, 5 Wend., 250; *Lansing vs. Lansing*, 8 John., 454; *Brown vs. Riker*, 4 John., 426; *Rust vs. Gott*, 9 Cowen, 169; *Smith vs. McMasters*, 2 Brown's C. P. Rep. of 1st district of Pennsylvania; *Allen vs. Hearn*, 1 T. R., 56..
4. Measure of damages asked by plaintiff in latter part of fourth instruction is correct.—*Mercer vs. Jones*, 3 Camp., 477; *Ingalls vs. Lord*, 1 Cowen, 240; *Kennedy vs. Whitewell*, 4 Pick, 466; *Jacoby vs. Laussatt*, 6 S. and R., 300; *Haiger vs. McMains*, 4 Watts, 418, 2d vol. Wheaton's Selwyn, title, "Trover," 5 Amer. edit., p. 1417, note D.

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5. Court erred in giving all instructions asked by defendants.—See decisions recited on refusal of plaintiff's instructions.

6. According to the genius and spirit of our laws and institutions, as well as upon grounds of public policy, all bets upon elections, and more especially presidential elections, which affects so many and diversified interests, are absolutely null and void.—*Phillips vs. Ives*, 1 Rawle, 36; 9 Cowen, 169, 180; *Wroth vs. Johnson*, 4 Har. and McH., 284; 3 N. H. Rep., 152.

HAYDEN and DAVIS, for Defendants in Error.

NAPTON, J., delivered the opinion of the Court.

This was an action of trover, brought by Hickerson, to recover the value of a horse alleged to have been converted by the defendants to their use.

The plea was, Not guilty. The parties went to trial, and the verdict and judgment were for the defendants.

It appears, from the bill of exceptions taken at the trial, that on the 16th of November, 1840, a bet was made between the plaintiff and defendants, on the presidential election, the terms of which were as follows: The plaintiff bet a certain horse against five hundred dollars, and delivered the horse to the defendants on the following conditions, which were reduced to writing at the time.

"On the first day of March, we, or either of us, promise to pay A. Hickerson, or order, the sum of five hundred dollars, value received. As witness our hands and seals, this 17th November, 1840.

"JAS. H. BENSON,

"D. WORKMAN."

The conditions of the above note are as follows: "Benson and Workman bet the sum of five hundred dollars, against A. Hickerson's bay stallion *Clifton*, that W. H. Harrison receives, for president, fifty electoral votes more than M. Van Buren. If the said W. H. Harrison does receive fifty electoral votes more than M. Van Buren, the note to be void and of no effect."

On the 23d December, Hickerson notified the defendants in writing, that the horse must be returned, because they (the defendants) had information in relation to the result at the time the bet was made, which he (the plaintiff) had not.

Some testimony was introduced with a view to establish a fraud on the part of the defendants, but the jury found, under the instructions of the court, a verdict for the defendants, and the plaintiff seeks to reverse the judgment, on the ground, that the law was not correctly expounded to the jury by the Circuit Court.

The instructions of the Circuit Court were, in substance, that the bet was not within our statute concerning gaming, and that, if the jury were satisfied there was no fraudulent concealments on the part of the defendants, the plaintiff could not recover.

We are of opinion, that the instructions of the Circuit Court were correct. We are not apprized of any rule of construction, or principle of public policy, which could warrant a court in declaring an election to be a game within the meaning of our statute. It is apparent, that if such a construction could be placed upon this

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this act, all wagers whatsoever, not only such as contravene principles of public policy and sound morality, but such as are made on subjects of entire indifference, and events in themselves of no importance, might, with equal propriety, and for similar reasons, be embraced within its provisions. A horse-race has been held to be a game or gambling device within the meaning of our statute, but an election is a political institution, essential to the existence and operation of our government, and recognized by the constitution and laws. It is difficult to see how such an institution could have been in the contemplation of the legislature when they enacted laws against games and gambling devices. There was, therefore, no error in the opinion of the Circuit Court on this point.

This bet was, however, clearly against public policy, and consequently void at common law. Whether a bet be made previously to an election, on its event, or subsequently on some collateral matter connected with the canvass, repeated adjudications, both in England and this country, declare such wagers illegal, upon principles of public policy and some morality.—*Rust vs. Gott*, 9 Cowen, 173; *Allen vs. Hearn*, 1 T. Rep., 56; *Brown vs. Riker*, 4 John. Rep., 438.

But the settled rule of law, in such cases, is, for the courts to leave the parties where they find them, on the maxim, "*Potior est conditio defendentis.*" If, however, either party will rescind the contract, before the event is known on which the wager depended, the courts will interfere, on the ground, that the parties are not then *in pari delicto*: the risk has not been determined, and the parties have a *locus penitentiae*. (*Aubat vs. Walsh*, 3 Taun., 283) So, also, where the money or property has not passed from the hands of the stakeholder, the losing party has been allowed to recover. (*Vischer vs. Yates*, 11 John. Rep., 23.)

In the present case, it will be observed, that the wager was not on the final result of the presidential election, but it was on the result of the vote in the electoral colleges.

By the laws of the United States, the colleges meet at the seats of government of the several States on the first Monday of December, and vote; their votes, sealed up, are then transmitted to Washington, and not opened in the presence of the two houses of Congress, until the second Wednesday in February, when the result is legally ascertained and declared. (See Story, Laws U. S., p. —.)

Whatever, then, might be the result of the presidential election, it is plain that the result of the electoral vote is settled by the electoral colleges on the first Wednesday of December, and that event could scarcely have been unknown to the plaintiff on the twenty-third of the same month, when he notified defendants of his intention to rescind the contract.

The judgment of the Circuit Court is affirmed.

TOMPKINS, J., dissenting.

Hickerson & Messerley vs Benson. Workman & McCauley.

HICKERSON & MESSERLEY vs. BENSON, WORKMAN & McCAULEY.

Although it is well settled, that, if one declares his dissent from an illegal wager before the event happens on which the wager depends, he may recover back his money or property, yet the rule must be attended with some qualifications for the prevention of fraud, as where the loss of the party may be foreseen with a moral certainty. Therefore, where A., on the 12th November, 1840, bet with B. that W. H. H. would receive, for president of the United States, thirty electoral votes more than M. V. B., and B., on the 23d December following, notified A. of his intention to rescind the contract, it was held, that an action to recover the property wagered could not be maintained by B.

ERROR to Howard Circuit Court.

CLARK and BELT, for Plaintiffs.

1. The court erred in refusing to give plaintiffs' first instruction.—See *Chitty on Contracts*, 4 Amer. edit., pp. 527, 8, and authorities there collected; *Watkins vs. Stockels' Administrator*, 6 Har. and John., 436; *Brogden vs. Walker*, 2 Har. and John., 292.

2. The court erred in refusing second instruction of plaintiffs.—See *Lowry vs. Bourdieu*, 2 Doug., 470; *Williams vs. Headly*, 8 East, 380, (note A); *Tappenden vs. Randall*, 2 B. and P., 467; *Busk vs. Walsh*, 4 Taun., 290; *Denniston vs. Cook*, 12 John., 376.

3. The court erred in refusing third instruction asked by plaintiffs.—See *Denniston vs. Cook*, 12 John., 376, and laws United States, first March, 1792, whereby Congress is required to be in session second Monday of February every fourth year. Votes to be counted, and election of president ascertained.

4. The court erred in refusing the fourth instruction asked by plaintiffs.—See *Rev. Code*, 290, sec. 1, 3; 4 Mo. Rep., *Shropshire vs. Glascock and Garner*, 536; 4 Mo. Rep., 599, *Boynton vs. Curle*.

5. The court erred in refusing fifth instruction asked by plaintiff.—*Busk vs. Walsh*, 4 Taun., 290; *Lowry vs. Bourdieu*, 2 Doug., 470; *Tappenden vs. Randall*, 2 B. and P., 467.

DAVIS, for Defendants in Error.

Referred to the following authorities: 8 John. Rep., 147; 4 do., 426; 12 John. Rep., 1 and 376; 9 Cowen, 169, note A; a general review of all the cases, English and American; 11 John., 28; *Vischer vs. Yates*, by Kent.

As to wagers void at common law, and those made so by statute, see 3 Wend., 494, *McKehon vs. Caherty*.

Hickerson & Messerley vs Benson, Workman & McCauley.

NAPTON, J., *delivered the opinion of the Court.*

The record of this case presents substantially the same points which the court has determined in the case of *Hickerson vs. Workman and Benson*, decided at the present term.

The wager, in the present case, was made on the 12th November, 1840, and was, that W. H. Harrison would receive, for president of the United States, thirty electoral votes more than Martin Van Buren.

On the trial, the court was called upon to say, that, until the first day of January, 1841, *Hickerson* had a right to rescind the contract. This is the only point in which it varies from the case of *Hickerson vs. Benson & Workman*, and for this refusal of the court so to instruct the jury, the plaintiffs ask a reversal of the judgment. The case of *Rust vs. Gott* (9 Cowen, 171,) is relied on, to sustain the position, that until the votes have been canvassed by the highest authority, and the result is officially announced, it cannot be known *legally* who is elected, and therefore, where a bet is made on the final result of an election, either party may rescind before that result has been thus legally and officially ascertained. There is nothing, however, in that case to warrant such a conclusion. It was an action by the winner against the stakeholder, after the stakeholder had returned the note to the maker. The court would not allow a recovery, on the ground, that the wager was illegal, and against the policy of the law, *though made subsequently to the election*. The tendency of such bets made after the election, but before the result was legally ascertained, was held to be equally pernicious and immoral with those made anterior to the election.

But the court did not undertake to determine whether the loser could have recovered against the stakeholder if he had refused to give up his note.

This case falls within the general principle asserted by Chief Justice Mansfield, in the case of *Aubert vs. Walsh*, 3 Taun., 284. After the contract is executed, the property or money delivered, and the risk determined, a losing party is not at liberty then to rescind: his repentance comes too late; the offence against the policy of the law has been consummated, and there is no motive to induce a court of justice to interfere between the parties.

It must be admitted, that the ancient rule on the subject of illegal wagers, not permitting the parties to such contracts to have the aid of the law to help them out of their difficulties, appears the most reasonable, and the least objectionable. The law, however, is now well settled, that if a man declares his dissent from an illegal wager, before the event happens, he may recover back his money. But this rule must be attended with some qualifications, otherwise it would open the way to the grossest fraud. If, for example, a wager is made, that A. will live ten years, and at the end of nine years eleven months and twenty-nine days A. is still alive, and the party betting that A. would not live the ten years gives notice that he withdraws his bet, would this be within the spirit and meaning of the rule?

The risk has not determined, the event has not happened, *but the value of the risk is greatly altered*. To allow a rescision of the bargain in such a case, and permit the gambler, who foresees his loss with a moral certainty, to withdraw his

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bet, through the aid of the law, would be a perversion of the first principles of justice, and making a court the instrument of encouraging fraud. After the relative condition and chance of the two parties has materially changed, the ancient rule of *potior conditio defendentis* must prevail.

It can hardly be doubted but in this case Hickerson, the plaintiff, on the 23d day of December, was fully aware that he had lost his wager.

The refusal of the court to instruct the jury, that he had until the first day of January to recall the bet, was, then, no error.

Judgment affirmed.

TOMPKINS, J.—I dissent.

STAPLETON vs. BENSON.

Under the plea of *non est factum*, the defendant will not be allowed to prove "that the bond sued on was a stake put up by the defendant against a similar bond executed by the plaintiff, as a wager upon the election of president of the United States," such defence being irrelevant to the issue.

Under this plea, it may be shown, that the defendant was a lunatic or a married woman, or that the bond was delivered as an escrow, or that it was altered: but where the defendant relies on matter extraneous, such as infancy or duress, usury or gaming, the facts must be specially pleaded.

APPEAL from Howard Circuit Court.

CLARK, BELT, and KIRTLEY, for Appellant.

1. Court erred in not permitting question to be put to jurors respecting their opinion as to bet made in this case, and whether, if the same was made on presidential election, they had a fixed opinion to find against such defence.—See Black. Com., 3d vol., (side-paging) 357-63, and notes, as to challenges of jurors *propter affectum*.

2. Court erred in not permitting defendant to prove, under his plea of "*non est factum*," that said bond sued upon was executed as a wager and bet upon the presidential election of 1840, and for no other purpose and on no other consideration whatever, and in excluding all evidence given from the jury, on the ground that said defence, under the plea pleaded by Stapleton, was irrelevant, and was not available under general issue plea.—See Rev. Code, 1835, p. 290, sec. 5.

3. This being a bet on presidential election, is void within our statute against gaming, and defence is proper under "*general issue*."—See 4 Mo. Rep., 536; Shrop-

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shire *vs.* Glascock & Garner, 4 Mo. Rep., 599; Boynton *vs.* Curl, and authorities there cited; Lyndell *vs.* Longbottom, 2 Wilson, 36; Goodburn *vs.* Marley, 2 Strange, 1159.

4. Court erred in granting eighth instruction asked by plaintiff.

As to ninth instruction asked and granted, it has been decided by this Court that want of affidavit only exonerates plaintiff from proof of manual execution of instrument sued on, and defendant may still, under his plea, prove the instrument not to be *his*, on account of alteration, duress, coverture, illegality of consideration, &c.—See Labeaume *vs.* Labeaume, and Hanley's Administrator *vs.* Reed, 1 Mo. Rep., 487, and Bates *vs.* Hinton, 4 Mo. Rep., 79.

5. Court erred in not hearing testimony as to the mutilation of the bond sued on, and in not withholding said bond from the jury.—See Jardine *vs.* Payne, 1 B. and Adol., 671; Sweeting *vs.* Halse, 9 B. and C., 365; Penny *vs.* Corwithe, 18 John., 500.

HAYDEN, *for Appellee.*

1. Did the court err in refusing the defendant liberty, in selecting the jury, to put the question to them, whether they had any fixed opinion that they would find against the defendant if the bond sued on should be clearly proved to have been staked as a wager on the presidential election?

2. Whether the instructions given the jury upon the motion of the plaintiff were correct or not.

3. Whether the finding of the jury was against law and evidence, and ought to have been set aside, and a new trial granted.

1st Point.—The counsel for Benson, in argument, will insist before the court that the defendant had no right to test the qualification of the jurors by putting the question which he proposed to put, and which the court refused him liberty to put; because the issue made in the cause for the trial by the jury was not such as to authorize the introduction of any evidence to show that the bond had been staked as a wager upon the presidential election; therefore, it was wholly immaterial what opinion the jurors had (if any) upon the point inquired about, &c.

2d. That the court instructed the jury correctly, and did not err in giving the instructions prayed for by plaintiff; because, in truth, the issue made by the pleadings imposed on the jury no other duty than to ascertain and determine whether the bond sued on was the bond of defendant and the amount due thereon, with the interest which had thereon accrued.

That the bond sued on was not, and is not, (supposing it to have been made as a stake upon the presidential election,) within the influence of our statute making bonds, &c., void when founded upon a gaming consideration.—See Digest of 1835, page —.

3d. That the court did right in overruling the motion for a new trial, for two good reasons: first, the finding was with the weight of evidence; and, second, if it were against the weight of evidence, the court did right in overruling the motion to enable the defendant to embrace a second chance of sustaining an unconscionable defence.

Stapleton vs. Benson.

NAPTON, J., delivered the opinion of the Court.

This was an action of debt, brought by Benson against Stapleton, on the following note :—

"On the 25th day of December, 1840, we promise to pay J. H. Benson the sum of one thousand dollars, in good and lawful money of the United States. As witness our hands and seals, this 3d day of December, 1838."

"HARRISON STAPLETON."
[and others.]

Stapleton pleaded *non est factum*, without affidavit, upon which issue was taken; the parties went to trial, and a verdict and judgment were had for plaintiff. From the bill of exceptions, it appears, that when the jurors were about to be sworn to try the cause, the defendant offered to ask said jurors, severally, whether they had any fixed opinion that they would find against the defendant if the bond sued on should be clearly proved to have been staked as a bet upon the last election for president: but the court, upon objections being made to such questions, would not permit them, and exceptions were saved to the action of the court on this head.

On the trial, the plaintiff offered in evidence the bond of defendant and others, whereupon the defendant offered to prove that a portion of the bond sued on, with writing thereon, had, after the execution of the bond, been torn off by the plaintiff, without the knowledge or consent of the defendant; but the court overruled this application, and permitted the bond to go in evidence. The defendant then offered to prove to the jury that the bond sued on was a stake put up by the defendant and his co-obligors, against a similar bond executed by plaintiff, as a wager upon the election for president of the United States; that said bond was given for no other purpose or consideration, and that plaintiff and defendant were legal voters; but the court rejected the same as irrelevant to the issue.

The defendant then introduced testimony, with a view to establish an alteration in the bond made by Benson without the knowledge of the defendant. This testimony it is not material to notice here, as the instructions of the court on that head were ample and satisfactory to the defendant; and the finding of the jury, upon correct instructions and a contrariety of testimony, cannot be disturbed by this Court.

The opinion delivered in the case of *Hickerson vs. Workman & Benson*, at the present term of this Court, embraces the point arising in the present case, concerning the illegality of the wager. It remains to be determined whether, aside from our statute concerning gaming, the defence offered could be given in evidence under the plea of *non est factum*.

The plea of *non est factum* put in issue the fact, whether the instrument was the deed of the defendant, and under this plea it may be shown that defendant was a lunatic or a married woman, or that it was delivered as an escrow, or that it was altered; but where the defendant relies on matter extraneous, such as infancy or duress, usury or gambling, the facts must be specially pleaded. (2 Tuck. Com., 104; 2 Chitty, 266.) The rule on this head is clearly stated by Starkie. (See Starkie's Ev., vol. 2, p. 381.) "The defendant cannot, under this plea,

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give any matter in evidence which avoids the deed, either at common law or by statute, unless it impeach the execution or continuance of the deed; and therefore cannot give in evidence, that the deed is void for usury, or that the bond was delivered to the plaintiff himself upon a condition not performed; or to a stranger, but not as an escrow." Occasional *dicta* may be found conflicting with this rule, but I have not seen any adjudged case in which a contrary doctrine has been held.

This being the settled rule in relation to the admissibility of the evidence sought to be introduced in the Circuit Court, under the plea of *non est factum*, it follows, that the court did right in not permitting the jurors to be examined about their opinions of such defences. Whether, under any state of pleading, these queries would have been proper, it is not now necessary to determine.

With regard to the course of the Circuit Court, in allowing the plaintiff to read the bond of the defendant, notwithstanding the defendant offered to prove an alteration of it without his consent, it is sufficient to observe, that it appears from the bill of exceptions, that all the testimony rejected then was subsequently submitted to the jury on the trial of the issue. The plea of *non est factum* not having been sworn to, the bond was admissible in evidence without proof of its execution. In this there was no error.

Judgment affirmed.

TOMPKINS, J.—I dissent from the opinion of the Court in all the cases founded on wagers on the presidential election, believing that they all are within the statute of 1835 concerning gaming.

TURNER vs. CRIGLER.

Defendant, as assignee of a promissory note executed by plaintiff to A., promised plaintiff, that if he would renew the note, he would pay him all he might be compelled to pay on account of certain judgments rendered against him, as garnishee in suits by attachment against A. Plaintiff then made some payments on the note, and gave his new note to defendant for the remaining part due: *Held*, that such payments, and the execution of the new note, constituted a sufficient consideration to support the promise.

ERROR to Howard Circuit Court.

CLARK, for Plaintiff in Error.

1. The evidence being clear, that the defendant promised the plaintiff to pay him whatever sum he might pay on account of the garnishee judgments, if he would execute to the defendant a new note, and that said note was executed upon

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the faith of such promise, the plaintiff had a right of action upon the breach of such promise.—1 Mar., 475; 2 Bibb., 450; 1 Monroe, 233.

2. There was a legal and valid consideration for the undertaking of the defendant, and the Circuit Court ought to have given the instructions prayed by the plaintiff. The court certainly erred in giving the instructions prayed by the defendant.—See 4 Mo. Rep., 431; Chitty on Contr., 6, 12, 16, 17; Digest, 1825, title, "Attachment," sec.—; 6 Mass. Rep., 58.

DAVIS, for Defendant in Error.

The only point arising in the cause is, as to the correctness of the instructions given by the court.

If Crigler made the promise to indemnify Turner upon any sufficient consideration, then the instructions were wrong.

But if Crigler made the promise, only in order to get Turner to do what in law he was bound to do before, then the promise is without consideration.—See Chitty on Contr., 6, 7; 2 Black. Com., 445; 3d vol. Mo. Rep., 453, Price vs. Cannon; 3d vol. Mo. Rep., Scott & Rule vs. Hill & McGunnege's Garnishees; 4 Mo. Rep., 431, Wolf vs. Cozens; see 5th section of act ("Bonds and Notes") Rev. Code, 105.

TOMPKINS, J., delivered the opinion of the Court.

This is an action of assumpsit, commenced in the Howard Circuit Court, by William Turner vs. Richard G. Crigler. The judgment of that court was given for the defendant, and, to reverse it, the plaintiff appeals to this Court.

It appears, by the record, that before the commencement of this suit, the plaintiff had executed a note to one Christopher C. Crigler, for about the sum of seven hundred dollars, and that the present defendant became the owner of the said note by assignment; that two of the creditors of C. C. Crigler commenced suit by attachment before a justice of the peace, and caused Turner, the plaintiff, here appellant, to be summoned as garnishee, who, upon his answer to the interrogations, admitted that he owed C. C. Crigler, aforesaid, upwards of six hundred dollars; that it was not then due, but would be due some time in October, 1839; whereupon, the justice entered up judgment against the said Turner, appellant, and he was directed to retain in his hands, when said money became due to said C. C. Crigler, so much thereof as would satisfy the demands of the plaintiff, in the suit by attachment against said C. C. Crigler; and that afterwards the defendant presented to him the note given as aforesaid to C. C. Crigler, which, as above-mentioned, had come to him by assignment, and demanded payment from the appellant, Turner; that Turner answered, he would pay the defendant the amount of the note, except what he had been ordered to retain, to satisfy the judgment in attachment above-mentioned, if the defendant would take currency; but the defendant (appellee) declined receiving it; that the appellee, Richard G. Crigler, told the plaintiff, Turner, as the note was somewhat torn, he would like to get it renewed;

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the appellant, Turner, objected, saying, that if he renewed the note, he would be compelled to pay the new note, and also the judgments in the suits by attachment above-mentioned; and that Crigler, the appellee, promised the appellant, Turner, that if he would renew the note, he would pay him all he might be compelled to pay on account of the judgment in the suits by attachment above-mentioned; that the appellant made some payments, and gave his note for the remaining part due on said note made as aforesaid to C. C. Crigler; that the appellant was afterwards compelled to pay the new note, and also the judgments obtained in the said suits by attachment.

On this evidence, the plaintiff asked these instructions, viz. :—

First: That if, from the evidence, the jury believe that defendant (appellee) promised the plaintiff, (appellant) that if he would execute a new note for the balance due, he, the defendant, would indemnify said Turner, plaintiff there, appellant here, against whatever sum he might be compelled to pay on the judgment aforesaid, and that said plaintiff, upon the faith of said promise, did execute a new note; and if they further find, that the defendant has not paid the said Turner the amount he may have paid on said judgments, then they will find for the plaintiff all he may have paid on said judgments, with interest and costs from the time the said plaintiff, Turner, may have paid the same.

Second: That it is immaterial whether Turner ought to have suffered judgment in the suits by attachment; if judgments were obtained, and he satisfied them under executions, and the defendant promised to pay him, and the note was executed in faith of said promise, the plaintiff is entitled to recover the amount paid, with interest and costs, from the time the same was paid. The court refused to give these instructions, but on the motion of Crigler, the appellee, gave the following, viz. :—

1st: If, from the evidence, the jury believe that Crigler had a note on Turner, due and payable, and that he, in order to get the note paid, or renewed, promised wholly to indemnify Turner against his liability on the judgments in the suits by attachment, such promise was not binding in law, being without consideration.

2d: That by law, if Crigler fairly obtained said note by assignment, he, Crigler, was not under any obligation to make a deduction from Turner's note, by reason of the said judgments in the suits by attachment; for if Turner permitted said judgments to be rendered against him upon his supposed indebtedness to C. C. Crigler, when, in fact, Richard G. Crigler was the legal owner of the debt, Richard G. Crigler's right to the money was not, and is not, affected by said judgments in the suits by attachment.

3d: That, from the evidence before the jury, the appellee, Crigler, was under no legal obligations to indemnify Turner against the effect of the judgments rendered by the justice, against said Turner, in favor of the plaintiffs in the attachment.

Turner, the appellant, excepted to the opinion of the court, in refusing the instructions prayed by himself, and in giving those asked by the appellee, Crigler: Turner moved for a new trial, and his motion was overruled, which was also excepted to.

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The appellee, Crigler, contends that the promise made by him is without consideration, it being made only to induce Turner to do what he was before bound to do. The appellee relies on *Price vs. Cannon*, 3 Mo. Rep., 453. In that case, Price pleaded payment on the 1st day of October, 1833, after the note sued on became due, and that, in consideration of this payment, Cannon, the plaintiff, had promised to wait with the defendant for the remaining part off the debt, until, &c.

The court say, "the whole sum was then due, and the payment by the defendant, of a part only of what he was bound to pay, formed no consideration for postponing the payment of the residue, and the verbal promise of the plaintiff, if made, could not be enforced."

I cannot see that this case resembles the case now before the Court.

The note made by Turner to C. C. Crigler, as appears by the evidence in the record, had been assigned by the payee to one Warren, and by Warren to Crigler, the appellee, and it certainly was some consideration that Turner paid a part of this money, and executed a new note for the remaining part, thereby saving to the holder the trouble of proving the two assignments.

The case of *Foster vs. Fuller*, 6 Mass. Rep., 58, is in point to prove that the making of a new note is a sufficient consideration to support the promise.

This Court, therefore, reverse the judgment of the Circuit Court, and the cause is remanded for a new trial.

ROUNDTREE vs. GORDON.

1. When a plea to a bill in Chancery is entered, if its sufficiency is questioned, it is not demurred to, but is set down for argument, and, if deemed bad, is overruled; otherwise, it is allowed.
2. A plea to a bill in Chancery must always be put in upon oath, unless it is a plea to the jurisdiction of the court, or of a matter of record, and such like matters, whose truth is apparent. And if a plea which is not sworn to is set down for argument, which is equivalent to a demurrer in proceedings at common law, it is no waiver of the irregularity.
3. A special replication is unknown in modern Chancery practice. When the defendant introduces new matter into his plea or answer, which makes it necessary for the complainant to put in issue some additional fact in avoidance of such new matter, he is permitted to amend his bill, and to the new matter thus introduced by way of amendment the defendant puts in a further answer, and thus has the benefit of a special rejoinder. If a material charge is omitted in the bill, and it is alleged in a special replication, the defendant is not bound to notice it, nor is he affected by it.
4. When an answer in Chancery is responsive to the bill, and positively, plainly and precisely denies the matter of equity in the bill, it is to be taken as true, unless it be contradicted by two witnesses, or by one witness and corroborating circumstances; but where the answer is thus contradicted, in any one or more important particulars, it is deprived, in all other respects, of that weight which is allowed to answers by the rules of a court of equity; for, being falsified in one thing, no confidence can be placed in it as to others, according to the maxim, *Falsum in uno, falsum in omnibus*.

APPEAL from Warren Circuit Court.

CARTY WELLS, *for Appellant.*

1. The defendant's plea in bar is good.

The deed of an infant is either void or voidable.—See 2 Burrow's Rep., 1804.

First: If void, it may be treated by all as a nullity.

If void, nothing passed by Cook's deed to Gordon, and he had no interest of which he could be defrauded.

Second: But, if voidable only, the making a new deed to Roundtree, after he became of age, was an act of sufficient solemnity to declare his avoidance of the first deed, and which was made in infancy.—See the above case in Burrow, and also 11 I. R., 539, and 14 I. R., 124.

Third: The deed was never delivered to Gordon, but left with the clerk incomplete, to be afterwards completed and delivered.

2. The replication is obviously bad.

To plead infancy, is a privilege granted to infants by law, for their benefit.

The fact, that he is an orphan, and without guardian, ought not to deprive him of that privilege; on the contrary, it should extend to him greater indulgence in its exercise.

Nor can the fact, that he has a wife and family, whose interests are at stake as well as his own, lessen the necessity for his security.

The facts, that he is an orphan and a married man, neither give strength to his intellect, or lessen the necessity of protecting his rights from the consequences of his own youthful indiscretion.

3. The decree is not warranted by the evidence. The answer denies the allegations of fraud and notice of the first deed.

To overturn this answer, the law requires two witnesses, or one with strong corroborating circumstances.

It is denied by but one witness, the father of the complainant. This witness indeed proves notice of a verbal sale, but not notice of the deed, and even his account of the verbal sale is not corroborated, for he (the witness) stated to other persons that this verbal sale was made to himself. The testimony tends to corroborate rather than to impugn the answer. To support the rule here contended for, see 1 J. C. R., 131; Eq. Dig., 81-84.

But, if notice of the verbal contract be proved, it is not a valid, but a void contract.—See 2 Mo. Rep., 135.

Gordon could not compel a specific execution of the contract with Cook: he could only maintain an action to recover back the purchase-money paid.—See 5 J. R., 85; 5 Mass. R., 133; 1 J. C. R., 131.

As to Cook's insolvency, complainant should not complain. He trusted him eight months with his contract open, giving him credit by leaving him the apparent owner of the land.

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4. The decree is erroneous, because it gives complainant more than his bill asks. The bill prays, that the deed to defendant may be set aside. The decree gives him the title.

5. The deed to Roundtree ought at least to be good as to Mrs. Cook's interest, yet the decree vacates it *in toto*.

W. M. CAMPBELL, *for Appellee.*

1. The Circuit Court did not err in overruling the demurrer of Roundtree to Gordon's special replication.—See Reeves' Dom. Rel., p. —.

2. If Cook was under age at the time he made the deed to Gordon, his act was merely voidable, and his continuing in possession of the mare, and permitting Gordon to retain possession of the deed and the original receiver's receipt without objection, are acts of acquiescence that amount to a confirmation.—See Bingham on Infancy, p. 10, note 2, p. 12, note 14, 15, 17, 18, 29, 34, 40, 41, 43, 46, 51; Reeves' Dom. Rel., 250, 1; 4 Pirtle's Digest, 523, 4.

3. The deed to Roundtree being fraudulent, cannot be a legal act of disaffirmance, by Cook, of the deed to Gordon.—Bingham on Infancy, pp. 49, 51, 63, 65, 68; Reeves' Dom. Rel., 259, 260.

4. Roundtree being a third person, cannot take advantage of the infancy of Cook.—See 5 John. Rep., 160; Bingham on Infancy, p. 1, note.

5. The plea of infancy is a personal privilege, intended as a defence, and not to be used by the infant, for the purpose of defrauding others.—Bingham on Infancy, p. 8; Reeves' Dom. Rel., 237, 241, 242, 246, 247, 248, 249, 260, 433.

6. Roundtree, before he purchased of Cook, was sufficiently apprized of the sale of the land to Gordon, to put him on his guard, and to affect him with notice.—4 Mo. Rep., p. —.

7. The sale by Cook to Gordon was a sale of the whole land, and the decree to him is properly for the whole land; neither a sale of the whole land, nor a decree for the whole land, can in any manner affect the possible contingent future right of dower in the land by Cook's wife.

8. There is no proof that Cook, at the time of the sale to Gordon was an infant, or that he was twenty-one years old when he sold to Roundtree.

SCOTT, J., *delivered the opinion of the Court.*

This was a bill in chancery, filed by the appellee against the appellant, in which it was charged, that the appellee purchased, from one William Cook, a tract of land, containing forty acres, for a mare valued at fifty-five dollars; that the mare was delivered to Cook, who thereupon placed in the hands of the appellee the receiver's receipt for the purchase-money of the land; that the transaction took place at the house of Grief Stewart, in the presence of persons called as witnesses, amongst whom was the appellant, who was well apprized of the whole affair; that it was agreed between the said appellee and Cook, with a full knowledge on the part of the appellant, that the appellee and Cook should

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meet at the clerk's office, in a few days, for the purpose of completing the bargain by the execution of a conveyance; that they met in pursuance of said agreement, and in consequence of the absence of Cook's wife, who was prevented by indisposition from attending, a deed was executed and acknowledged by Cook alone, and, with the consent of the parties, it was left with the clerk until Mrs. Cook should come to execute and acknowledge it; that, whilst the deed was in this situation, the appellant, with a full knowledge of all these facts, some nine months after, purchased the same land from Cook, and, by artfully employing means to conceal his design from the appellee, he contrived to have a deed executed, acknowledged, and recorded before that of the appellee.

The prayer of the bill was, that the appellant might be compelled to convey the legal title thus fraudulently acquired by him.

Cook was made a party defendant, and admitted the truth of the fact charged in the bill.

The appellant, Roundtree, filed a plea, alleging, in substance, that Cook, at the date of the conveyance to the appellee, was an infant under the age of twenty-one years, and that at the time of executing the conveyance to him he was of full age.

To this plea, the truth of which was not sworn to, there was a demurrer, which was afterwards withdrawn, and a special replication filed, alleging that the said Cook, before executing the conveyance to the appellee, had for some time been full grown—had the size and appearance of a man of age; that he was married, and had been transacting business for himself; that he had purchased the land in dispute from the United States; that his father was dead, and that he had no guardian.

To this replication there was a demurrer, which, after argument, was overruled.

The appellant, Roundtree, then filed an answer to the bill, in which it was admitted, that, at the time mentioned, he purchased from Cook the land in controversy, but denies that he ever heard or knew that the appellee had bought the land until after he had obtained, and put on record, a deed for the same; that, on the day of the agreement in relation to the land, he, with others, amongst whom was Jonathan D. Gordon, the father of the appellee, was present; he heard some one say that Cook and Gordon had traded; he did not recollect that he saw the appellee at the place during the day; he supposed it was Cook and Jonathan D. Gordon who had made a bargain, and did not learn, until after he had left the place, the subject matter of it; he denied that he was called to witness any contract, as charged in the bill; on his way home he was informed by Jonathan D. Gordon, that he had purchased from Cook the land in dispute, for which he gave a certain mare, which was described.

Some nine months after, Cook being indebted to him in the sum of one hundred and fifty or two hundred dollars, proposed to give the land in part payment of the said debt; that he inquired of Cook if he had not sold the land to J. D. Gordon. Cook informed him that he had received a mare for the land, but that only a verbal contract existed between him and Gordon; that Gordon had taken an undue advantage of him; that he was under age; did not feel himself under any

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obligation to make to Gordon a conveyance of the land, and would not do so, but would pay him for the mare. That, after receiving this information from Cook, and after repeated solicitations, he purchased the land, for which he gave him credit for fifty-five dollars, part of the said debt.

It was admitted, that he requested the person who drew the conveyance, and the justice before whom it was acknowledged, to keep the transaction a secret, but alleges, as a reason for the request, that Jon. D. Gordon was especially deputed to serve as constable for him, and had in his hands several executions in his favor, which he was afraid Gordon would neglect if he was informed that he had purchased the land. He denies, that he had any knowledge of the conveyance to the appellee before he was served with process in this cause. To this answer there was a replication. Witnesses were examined, one of whom testified that J. D. Gordon made the contract; that both J. D. Gordon and his son, the appellee, were present; that when he was called to witness the agreement, he was informed that the appellee's mare had been given for the land; that whilst the bystanders were conversing about the bargain, he heard the appellant say, that it was a piece of good land; he had shown it to Cook.

Jonathan D. Gordon, among other things, testified that he bought the land for his son, as his agent, by special request; that he was in the habit of making bargains for his sons; that the appellant, with others, was present; that he heard the appellant say to his son, the appellee, "You have made a good trade; it was a piece of good land; he had shown it to Cook to enter;" that he and the appellant, on their way home from Stewart's, had a full conversation on the subject of the contract; that it was fully understood by the appellant, that the land was purchased for his son; that he and Roundtree, the appellant, lived within a quarter of a mile of each other, and knew each other's stock, and that the appellant well knew that the mare given for the land belonged to his son, the appellee. Other witnesses were introduced, who testified they were present at the time of the contract, and it was their impression that it was made with Jon. D. Gordon.

On a hearing, the court below decreed for the appellee, who was complainant.

It will be necessary to dispose of the plea, and the proceedings consequent upon it, before we take up the point on which the cause turns. All the steps of the parties in relation to the plea were novel, and such as are not usual in courts of chancery: they are without precedent to sustain them.

When a plea to a bill in chancery is entered, if its sufficiency is questioned, it is not demurred to, but it is set down for argument, and if it is deemed bad, it is overruled, otherwise, it is allowed.

A plea to a bill in chancery must always be put in upon oath, unless it is a plea to the jurisdiction of the court, or of a matter of record, and such like matters whose truth is apparent; (Cooper's Equity, 231; Smith's Chancery Practice, vol. i., p. 231;) and if a plea which is not sworn to is set down for argument, which is equivalent to a demurrer in proceedings at common law, it is no waiver of the irregularity. (2 Ves. and Bea., 355.) A special replication is unknown in modern chancery practice: it was occasioned by the defendant's

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introducing new matter into his plea, or answer, which made it necessary for the plaintiff to put in issue some additional fact on his part, in avoidance of such new matter introduced by the defendant. The consequence of a special replication was a rejoinder, and then a sur-rejoinder, &c. This course of proceeding proving tedious, and productive of delay and expense, has long since been altered, and instead of a special replication, the plaintiff is permitted to amend his bill. To the new matter thus introduced by way of amendment, the defendant puts in a further answer, and thus has the benefit of a special rejoinder. (Cooper's Equity, 329.)

If a material charge is omitted in the bill, and it is alleged in a special replication, the defendant is not bound to notice it, nor is he affected by it. (*Ibid.*) From this view of the course of proceedings in chancery, it is obvious, that all the steps taken in the court below, in relation to the plea of infancy, were irregular. The plea not having been put in upon oath, the irregularity we have seen was not waived by setting it down for argument, and the matter of the special replication not affecting the defendant below, and as from proceedings so irregular no inference or admission can be made injurious to either party, we feel ourselves warranted, in determining this cause, to lay aside all consideration of the fact of infancy, especially as it was not properly before the court below, and as there is no proof of its existence in the record.

The question on which the cause turns is, whether the appellant had actual notice of the conveyance to the appellee when he purchased the land from Cook? The statute concerning conveyances, sec. 32, provides, that no instrument in writing that conveys any real estate, or whereby any real estate may be affected, either in law or equity, shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record. Notice is of two kinds, actual or express, and constructive or implied; this latter sort is also sometimes termed legal, or presumptive notice. Implied, or constructive notice, is that which arises from presumption and construction of law; it is evidence of notice, the presumption of which is violent, that the law will not allow of its being controverted. Being sometimes contrary to the fact, it is confined to cases in which violent presumption of actual notice arises. (Fonblanque, 447.) A *lis pendens*, or pendency of a suit in one of the superior courts of justice, is ahead of constructive or implied notice to all persons. Actual notice is a real knowledge of the existence of the prior incumbrance, and it is proved by direct evidence, or by proof of other facts, from which such knowledge may be justly inferred; and when proved even by circumstantial evidence, it is as confidently taken to exist, as if proved by direct evidence; and because it is established by circumstances, it cannot, therefore, be termed constructive notice, no more than the payment of a debt proved by circumstantial evidence would be called a constructive payment.

It was contended by the appellant, that, as he had denied all fraud and notice of the prior conveyance to the appellee, and as that answer is disproved but by a single witness, he is therefore entitled to a decree. It may be admitted, that, when an answer positively, plainly, and precisely denies the matter of equity in

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the bill, and when the answer is responsive to the bill, it is to be taken as true, unless it be contradicted by two witnesses, or by one witness and corroborating circumstances. (1 Mad., 338.) But where an answer is contradicted in any one or more important particulars, by sufficient evidence, that is, by two witnesses, or one witness with corroborating circumstances, it is deprived in all other respects of that weight which is allowed to answers, by the rules of a court of equity; for being falsified in one thing, no confidence can be placed in it as to others, according to the maxim, *Falsum in uno, falsum in omnibus*.

And it has been held, that the answer may, in itself, contain the circumstances giving greater credit to the witness, sufficient to found a decree against the defendant. (9 Ves., 275; 2 John. C. R., 93, 4.) A learned judge has remarked, when speaking on this subject, "That, on a public examination, a witness may, by sudden and ill-understood questions, be made to commit contradictions, which are to be held up as fatal to his general testimony. But when a witness is examined deliberately, and in private, upon interrogatories prepared, and has the opportunity of weighing his answers before he finally signs them, they being read over to him, it must at least be admitted, that whatever other disadvantages such a mode of judicial inquiry may be exposed to, it can never be seriously urged that a witness has been entrapped by surprise, and through inadvertence, and that he has been made to say, in hurry and confusion, and from mere weakness of nerves and apprehension, that which, on recollection and deliberation, and the free use of his understanding, he has a right to unsay. Therefore, in courts proceeding in this course of examination, the rule of *Falsus in uno, falsus in omnibus*, is a rule of unexceptionable justice."—1 Robinson, 54.

It is impossible to read the answer of the appellant, and the evidence of the witnesses preserved in this cause, without coming to the conclusion, that he had actual notice of the prior deed. The appellant was at the place where the bargain was made, which was the house of an individual, at which some ten or twelve persons were present, and all who were sworn say the contract was publicly spoken of.

The appellant alleges, in his answer, that he understood that Cook contracted with the father of the appellee; this is literally true, but he does not say whether he knew whether the father was acting for the son; there is nothing contained in the answer that repels the inference he had such knowledge, and, indeed, from the cautious manner in which the answer is worded in this respect, a well-grounded suspicion arises, that he was fully aware the father was acting for the son. The appellant resided within one half mile of the father of the appellee, who lived with his father; he knew old Mr. Gordon's horses; and is it to be supposed that he was ignorant of the fact, that the mare belonged to the appellee?

But the principle last above stated is decisive of this cause. Roundtree, the appellant, in his answer, expressly denies that he knew the subject-matter of the agreement between the appellee and Cook. This is an important particular in the answer, and yet in this particular his answer is flatly contradicted by two witnesses.

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The first witness sworn, states, that in a conversation about the bargain between the appellee and Cook, he heard the appellant say, "it was a piece of good land;" another heard him say, "the appellee had made a good bargain, for it was a piece of very good land."

The answer being thus falsified in one important particular, all confidence in it, in all other respects, is destroyed, and the evidence of the witnesses fully sustain the case of the appellee.

Decree affirmed.

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1. If several are sued in trespass, and some are acquitted, and others are found guilty, the latter may move for a new trial without being joined in such motion by the former; and the verdict may be set aside as to those found guilty, without affecting the validity of the finding as to the others.
2. Where a person who is a material witness for the defendant, in an action on tort, has been joined with such defendant, and there is no evidence, or slight evidence against him, the jury may find a separate verdict in his favor; in which case, the cause being at an end with respect to him, he may be admitted as a witness for the other defendant.
3. The manner of examining a witness is entirely within the discretion of the court before whom the witness is produced. Material testimony ought not to be rejected because offered after the evidence is closed on both sides, unless it has been kept back by trick, and the opposite party would be deceived or injuriously affected by it. So, after a witness has been examined and cross-examined, the court may, at its discretion, permit either party to examine him again, even as to new matter, at any time during the trial.
4. If a witness is sworn, and gives some evidence, however formal or unimportant, he may be cross-examined in relation to all matters involved in the issue.
5. Where a constable offers in evidence the verdict of a jury summoned "to try the right of property between the defendant in the execution and the claimant," under the 14th, 15th, and 16th sections of 7th article of the act relating to justices' courts, (R. S. 1835, p. 367,) it must appear that the jury were sworn by some person empowered to administer oaths. Although the statute declares, that "the constable shall administer an oath to each of the jurors," &c., yet any qualified officer may administer the oath.
6. Where the claimant of the property levied upon withdraws his claim before the trial of the right of property, the constable is not warranted in proceeding any further with the trial.
7. An execution issued by a justice of the peace is a lien on all the goods and chattels of the defendant in the execution, within the limits of the township to which the execution is directed, from the time of its delivery to the constable.

APPEAL from Howard Circuit Court.

CLARK and KIRTLEY, for Appellant.

1. That the court below erred in permitting plaintiff's counsel to re-introduce and re-examine, in chief, Taylor and Duncan, under the circumstances of this case.

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—See 3 Chitty's Practice, 901, 2, and note; 1 Stark. Ev., 181; 12 Mod. Eng. R.; 2 Carr & Payne, 121, *Giles vs. Powell*.

2. That the verdict of the constable's jury, finding the property in controversy subject to the executions, was competent and legal evidence in the defence, and was improperly rejected by the Circuit Court.—Statutes of Mo., sec. 14, p. 367.

3. That Col. Davis was sufficiently and properly sworn to answer questions to establish the collateral fact of the notice of Burrus' claim to the negro; and the court erred in considering him as defendant's witness-in-chief, and in allowing plaintiff's counsel to cross-examine him in that character.

4. That the executions in the hands of the constable, as soon as endorsed by him, was a lien on Duncan's personal property within the township, and that the Circuit Court erred in giving plaintiff's first instruction.—See Statutes of Mo., sec. 6, p. 366; sec. 18, p. 256.

5. The Circuit Court erred in overruling the motion for a new trial, for in addition to the above reasons, the damages were clearly excessive beyond the sum remitted, and because Bennett Brown was precluded from the benefit of the testimony of Robert Brown and Ford, material to his defence, by the improper conduct of the plaintiff.—See 6 Bac. Abr., 672; 2 J. J. Marshall, 52, *Daniel vs. Daniel*; 7 Wend., 62, *Jackson vs. Warford*; 6 Mo. Rep., 604, *Smith vs. Matthews*.

DAVIS and LEONARD, for Appellee.

1. That no new trial can be granted upon the motion of one defendant; that the verdict must be set aside *in toto*, or not at all.—See 2 Tidd's Practice, p. 911; 2 Strange, 814; 3 Salk., 362; 12 Mod., 275; in this edition of Tidd, 329.

2. It is insisted, that the verdict of the jury who tried the rights of property was rightfully excluded from the jury as evidence in the cause, because the jury was not sworn by the constable.—See Revised Statutes of Mo., p. 367, sec. 15 of act concerning justices' courts, title, "Execution."

Where a summary mode of proceeding is given by statute, the statute must be strictly pursued.—See 2 Starkie's Ev., 432, title, "Justices." Otherwise the whole proceeding is void.—See *Davidson vs. Gill*, 1 East, 64.

Again: The evidence in the cause shows conclusively, that had the verdict of the jury who tried the rights of the property been allowed in evidence in this cause, it would have been to permit Brown, the constable, to destroy that very title to the slave Nancy which he himself had been instrumental in creating in the plaintiff, Burrus. It cannot be conceded that an act of the legislature, made for the justification and protection of a public officer, is thus to be made an instrument to shield and protect the officer against his own wrongs.

SCOTT, J., delivered the opinion of the Court.

This was an action of trespass, commenced by the appellee, against Bennett C. Brown, the appellant, Nathaniel Ford, and Robert Brown, for seizing and taking away a negro girl 'slave, named Nancy. The defendants pleaded Not guilty, and

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on the trial Nathaniel Ford and Robert Brown obtained a verdict, and the appellant, Bennett C. Brown, was found guilty, and damages to the amount of \$406 assessed against him.

From the testimony preserved in the cause, it appears, that the appellant was the constable of Richmond township, in Howard county, and had several unsatisfied executions in his hands against George Duncan, a resident of said township.

Duncan, by a bill of sale, of a date subsequent to the delivery of the executions to the appellant, sold and conveyed the slave in controversy to the appellee, Burrus. There was testimony conducing to show, that the appellant consented to the sale of the slave to Burrus, on condition that the purchase-money should be paid to William Taylor, a trustee under a deed of trust executed by the said Duncan, and that it should be applied in satisfaction of the claims of the several creditors of Duncan according to the priority of their liens under the trust-deed, and the executions. This fact was controverted by the appellant.

The slave mentioned in the declaration was seized by the appellant, and sold under the executions at public sale. It appeared from the return on the executions in the hands of the appellant, that they were levied on the slave before the date of the bill of sale and her delivery, but the truth of the return was disputed, and evidence conducing to show its falsity was introduced. The appellee claimed the slave before the sale under the executions, and required a trial of the right of property between Duncan, the defendant, and himself, but afterwards, and before the trial, withdrew his claim of property. The appellant, however, proceeds with the trial, and the jury reported a verdict that the slave was the property of the defendant in the execution. The oath to the jurors was administered by William Taylor, who, it does not appear from the record, was authorized to administer oaths. The court below refused to admit in evidence the verdict of the jury. During the trial, the court permitted witnesses to be recalled, and give evidence in chief, who had once been examined and cross-examined. A witness was called by the appellant, merely to prove the fact that the appellee preferred a claim to the slave after the levy was made, and was suffered by the court to be cross-examined, in chief, by the opposite party. Some evidence was given against the defendants, Ford and Brown, in the court below.

At the instance of the plaintiff, appellee, the court instructed the jury that nothing but a levy vested any property in the constable to the slave in controversy, and that a levy is the actual seizing of the property by the officer, under and by virtue of the execution. This instruction was objected to by the appellant, but was given.

On motion of the appellant, the court instructed the jury, that if the constable had executions in his hands against Duncan, which were unsatisfied at the time of the sale of the negro Nancy, such executions were by law a lien upon said negro, as well as Duncan's other property.

The first question raised is, that if several be sued in trespass, and some are acquitted and others found guilty, whether those found guilty can move for a new trial unless those join in the motion who are acquitted? Cases have been referred to in which it has been held this cannot be done. (2 Strange, 814.) The rule

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seems to have been a technical one, and not founded in substantial justice. It was a principle, that the jury could not find less than the whole issue before them; if they did, the verdict was bad, and the whole must be set aside. If the issue, whether four are guilty, is submitted to a jury, and two be found guilty, and two acquitted, the verdict as to the two who are guilty cannot be set aside without affecting the validity of the finding as to the other two. This seems to have been the reason of the rule; it is a harsh one, and one by which a plaintiff may prevent a party entitled to a new trial from obtaining it by joining one that he knows will be acquitted, or whom he may have acquitted by withholding evidence against him. When a judgment was rendered against several, and some of them refused to join in a writ of error, the common law provided a mode by which the party who felt himself aggrieved could obtain redress, notwithstanding the obstinacy of those with whom he had been joined.

Why should not a party have a mode of getting rid of an unjust verdict? and why should a plaintiff take advantage of the situation of a defendant, in which he may have been placed by his own contrivance? This rule once prevailed in indictments for misdemeanors, but it is now exploded, and a defendant found guilty may move for a new trial, notwithstanding others who were grieved with him have been acquitted.—See *The King vs. Mawley*, 6 Term R.; *The People vs. Vermilyea*, 7 Cowen, 369.—During the argument of the case cited from Term Reports, Grose, Justice, mentioned a case, in which a new trial had been granted as to one issue out of several.

In the case of *Price vs. Harris*, (25 Eng. Com. Law Rep.,) we find the court relieving the plaintiff of the difficulty in which he was involved by joining too many defendants, by granting a new trial, on condition of paying costs against some of the defendants who were acquitted. If this favor can be extended to a plaintiff who has caused the difficulty by joining too many defendants, how much more should it be allowed to a defendant?

Another point in the cause is, that the court should have granted a new trial, because the appellee, plaintiff below, joined Ford and Brown as defendants, and thereby deprived the appellant of their evidence. Ford and Brown being acquitted, became competent witnesses for the appellant, and he was prevented from examining them by the act of the appellee.

The proper course for a defendant to pursue under these circumstances, if there is no evidence, or if there is slight evidence, is, to have the jury pass on the case, and then introduce him as a witness. It may be inferred, from a departure from this course, that there was probable cause for joining those who were acquitted. The want of all authority in support of the position of the appellant is a strong argument against it. In the case of *The People vs. Vermilyea*, 7 Cowen, it was held, that such testimony is not newly discovered, though the acquitted defendant is now, for the first time, made a competent witness.

It is also assigned for error, that the court permitted a witness who had been examined in chief, and cross-examined, to be again called and examined in chief.

The manner of examining a witness is entirely within the discretion of the court before whom the witness is produced, and that discretion must be governed,

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in a great measure, by a knowledge of the character of the witness, and from his demeanor during his examination. A party producing a witness who, whilst deposing, manifests intelligence, candor, and a freedom from all bias for or against either party, would be more liberally indulged than one who introduced a witness who displayed all the opposite qualities.

We have no report of the trial, and there is nothing upon the record to govern this Court, in revising the discretion of the Circuit Court, but simply what the witness deposed. His conduct, his manner, whether he showed a bias, is altogether unknown, and it would be like the blind attempting to lead those who have light, to interfere in this matter. But, even did we interfere, and reverse the judgment for this cause, how would the party complaining be benefitted by a new trial? Would not the evidence, of the introduction of which he complains, come out in an unexceptionable manner on another trial? In the case of *Rucker vs. Eddings*, 7th vol. Mo. Rep., it is said, the law has entrusted courts with a discretion in allowing the parties to a cause to obviate the effects of inadvertance, by the introduction of testimony out of its order. This discretion is to be exercised in furtherance of justice, and in a manner so as not to encourage the tampering with witnesses, to induce them to prop a cause whose weakness has been exposed. When mere formal proof has been omitted, courts have allowed witnesses to be called, or documents to be produced, at any time before the jury retire, in order to supply it. So, material testimony ought not to be rejected, because offered after the evidence is closed on both sides, unless it has been kept back by trick, and the opposite party would be deceived or injuriously affected by it. So, after a witness has been examined and cross-examined, the court may, at its discretion, permit either party to examine him again, even as to new matter, at any time during the trial. We think these rules are founded in justice and reason, and see no cause for departing from them.

Another point made by the appellant is, that a witness who was introduced to prove a single insulated fact, the mere giving notice of the claim of the right of property in the slave, was suffered to be cross-examined in chief by the opposite party. The question involved in this point has been settled by this Court, in the case of *Page vs. Kauky*, 6th vol. Mo. Rep., where it was held, that if a witness is sworn and give some evidence, however formal or unimportant, he may be cross-examined in relation to all matters involved in the issue.

It is next objected, that the court erred in refusing to receive in evidence the verdict of the jury summoned by the appellant, to try the right of property between the defendant in the execution, and the appellee, Burrus.

It does not appear, that the jurors who rendered the verdict were sworn at all; it is stated on the record, that they were sworn by William Taylor, but it does not appear that he was empowered to administer oaths. In proceedings of this kind, if we consider the officers entrusted with their conduct, the utter inability of obtaining a formal accuracy is easily perceived. This cannot be expected; and if the law is substantially complied with, it is satisfied. Although the statute is imperative, that the constable shall administer the oath, yet we can see no reason why it should be so construed as to prevent any qualified officer from administer-

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ing it. There are instances in the books in which the word *shall* has been construed as if written *may*. Immediately after the direction, that the constable shall swear the jury, it is declared, he may administer the oath to the witnesses. Can we believe it was the intention of the legislature, that the constable, and nobody else, should swear the jury, and that he or any other qualified officer might administer the oath to the witnesses?

It was foreseen, that it would frequently happen in such trials, that an officer, other than the constable, could not be had to administer oaths; to obviate this, the constable himself was empowered to perform this act, and we do not consider that he is prohibited from employing another officer to do it. Inasmuch as it does not appear that the jury was sworn at all, we are of opinion, the verdict was properly rejected as evidence; this was a matter of substance, and its omission vitiated the whole proceeding. The claimant, it appears, before the trial, withdrew his claim of property; and it is contended, that having done so, the constable was not warranted by law in proceeding any further with the trial, and a verdict obtained after such withdrawal would be no protection against the suit of the claimant. We can perceive nothing in the law which compels a party, after he has demanded a trial of the right of property, to persist in that demand. He may, or may not, at his own option, interpose his claim; he is under no obligation to do so, and if he will withdraw it before the commencement of the trial, we see nothing to prevent him.

In these trials, constables frequently have an interest against the claimant. Whether he receives his commission or not, will sometimes depend on the verdict. If the claimant is permitted to withdraw his claim when not satisfied with the fairness of the conduct of the officer, it will be some corrective to the evils incident to this mode of proceeding.

The last point made in the cause is, that the court gave contradictory instructions to the jury; instructing them first, at the instance of the appellee, that nothing but a levy vested any property in the constable to the slave in controversy, and afterwards instructing them, (without withdrawing the first instruction,) that if the constable had executions in his hands against Duncan, which were unsatisfied at the time of the sale of the negro Nancy, such executions were by law, a lien upon said negro, as well as Duncan's other property.

It is the duty of the court to give the law applicable to the case to the jury, especially when required so to do at the instance of a party. This duty must be exercised in such a manner as not to mislead or confound the jury. The two instructions set out above could not both be law; one or the other should have been rejected; and the fact of one being posterior in point of time to the other, is no withdrawal of the first, unless it is expressly so declared. It will become necessary to determine which of these instructions should have been given, or in other words, whether an unsatisfied execution in the hands of a constable is a lien upon the goods and chattels of the defendant in the writ? It is contended, that the general law on the subject of executions, 18th section, giving, or rather restricting the lien, to the time of the delivery to the officer, is only applicable to executions issuing from the courts of record; that statutes relative to proceedings

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of courts of record are not to be construed so as to extend to courts of limited and inferior jurisdiction; and that there are some provisions of the execution law which are by express enactment made applicable to justices' courts, which raises an implication that others were not designed so to be. It may be remarked, that some of the provisions of the execution law have always been held applicable to executions from justices' courts. There is nothing in the law relative to those courts which exempts any property of the defendant from execution, yet it has never been questioned, that property exempt by the general law relative to executions is also exempt from levy and sale under executions issuing from justices' courts.

Even should the general law be construed as not extending to executions from justices' courts, we are not clear, that by the common law the lien of the execution would not still exist. The 18th section of the act concerning executions does not give the lien; it limits its extent.

By the common law, an execution was a lien from its teste on all the goods and chattels of the defendant, within the limits of the county to which it was directed. It may well be, that the legislature, considering the shortness of the time between the teste and return of an execution, issuing from a justice's court, intended that the common law, as regards them, should still remain in force. Why is the constable required to note the time of the delivery of the execution, if it was not intended that the writ first delivered should be first satisfied? It is said, that by the law the sheriff was required to satisfy, before all others, the execution first coming to his hands, but does not that requisition take its origin in the lien conferred by the execution?

The case of *Wylie vs. Hyde*, 13 J. R., has been cited in support of the position, that an execution in the hands of a constable, before an actual levy, is no lien on the goods of the defendant. The court, in the case cited, did not deny the existence of the lien prior to the levy, on general principles, but inferred its non-existence from its incompatibility with other statutory provisions, leaving us to infer, that but for that incompatibility it would prevail. The extents of the jurisdiction of justices' courts would disincline us to the opinion, that the legislature intended taking away the lien of the execution.

Why should the suitors of some courts have so great an advantage over others? The practical construction of the law has been, that the lien existed from the delivery of the writ to the constable.

The law, as has been observed, requires the constable to note the date of the delivery, by an endorsement on the execution. If several executions come to the hands of a constable at different times, and they are levied at the same time, and the property of the defendant is insufficient to satisfy them all, they are not paid *pari passu*, but the execution first delivered is first satisfied. Why is this done, if the execution is no lien? Will it be said, that the bare delivery of an execution to a constable gives a party the priority over an execution subsequently delivered, although both may be levied at the same time, and it is the levy that creates the lien? If the levy alone gave the lien, then it would seem, all executions levied at the same time would be paid *pari passu*. Rights have

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been conferred and titles acquired under the impression, that an execution in the hands of a constable is a lien on the goods of the defendant from the time of its delivery; and we are of the opinion, that the jury should have been instructed that the execution was a lien on all the goods and chattels of the defendant in the execution, within the limits of the township to which the execution was directed, from the time of its delivery to the constable.

Judgment reversed, and cause remanded for a new trial.

TOMPKINS, Judge.—I concur in the opinion of the Court reversing the judgment, but it is my opinion that a party who demands a trial of the right of property in the possession of the constable has no right, by declining to proceed in the trial, to deprive the constable of the benefit which the statute holds out to the constable by such trial, and that the constable, for his own security, may still go on and try the right.

PERKINS vs. REEDS, ADMINISTRATOR OF NASH.

1. In covenant, the declaration should state a covenant of the defendant to the plaintiff.
2. The court adhere to the decision made in *Ellett vs. Bobb*, (6 Mo. Rep., 324,) that where a person hires a slave for a certain time, and agrees to return the slave at the end of that time, and the slave, in the mean time, runs away, without the fault of the hirer, who has used due diligence to prevent the escape, and retake the slave, but without success, he will only be liable for the hire, and not for the return of the slave.

ERROR to Lincoln Circuit Court.

WELLS, for Plaintiff in Error.

CAMPBELL, for Defendant in Error.

TOMPKINS, Judge, delivered the opinion of the Court.

Gabriel Reeds, Administrator of Gabriel P. Nash, brought his action of covenant against Walton Perkins and Lewis H. Wren, in the Circuit Court of Lincoln county, and judgment being given for him there, Walton Perkins now prosecutes his writ of error in this Court.

The declaration states, that, for that whereas, &c., the defendants made their certain writing obligatory in the words following, viz.:—

“Twelve months after date, we bind ourselves to pay Gabriel Reeds, Administrator, &c., the sum of two hundred dollars, for the hire of Luke and wife and child, belonging to said estate, for the term of one year from the date hereof, and

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to furnish, &c., and to return said slaves to said administrator, &c.—Given under our hands and seals, &c., and signed and sealed by Lewis H. Wren and Walton Perkins.”

The declaration concludes with an averment that the slaves were delivered, but that Luke, one of the slaves, had not been returned, &c.

To this declaration, the defendant Perkins pleaded—

1st: *Non est factum*, without an affidavit.

2d: That he did return the said slave, Luke.

On these pleas, issue was joined. The defendant further pleaded, that after the hiring and before the time of the delivery of said slaves, the said slave Luke, without any default or negligence, &c., did escape and ran away, and cross the Mississippi river, into the state of Illinois, averring fresh pursuit and diligent search, &c.

The defendant further pleaded, that he hired said slave Luke to one Hough, and said slave ran away from said Hough, with like averments as in the preceding plea. To these two pleas, a demurrer was filed and sustained; a trial of the issue joined on the two first pleas was had, and verdict and judgment was given for the plaintiff.

The defendant moved in arrest of judgment, and his motion being overruled, he brings his case here by a writ of error.

The declaration is clearly defective, because it states no covenant of the defendant to the plaintiff.

It states, that the defendants, Wren and Perkins, made their certain writing obligatory in the words, &c., following, &c., but this for any thing appearing on the record, might even have been burnt up, or not delivered.—See the case of *Muldrow vs. Tappan*, 6th vol. Mo. Decisions, 277, and authorities there cited.

There it is said, that the declaration must aver or assert a promise on its face, or must contain words equivalent to a promise. The judgment ought then to have been arrested.

The defendant in the Circuit Court, appellant here, in support of his pleas, relies on the case of *Ellett vs. Bobb*, 6 Mo. Dec., 324, and the authorities by the counsel for the defendant in error in that case. The counsel for the defendant in error considers the decision of the court, in the case of *Ellett vs. Bobb*, so opposed to the principles of the law, as established by authorities and legal decisions, and so contrary to the sound policy of the country, and so dangerous to the rights of minors and orphans, that he feels confident the Court will reconsider the question, and establish the true principle of law in relation to that subject. He relies on the current of common law authorities, and judicial decisions on the subject of bailment and contracts, and, more particularly, the decisions in relation to rented property consumed by fire during a lease, where there is an express covenant to repair.

He contends, that the case of a hired slave is even stronger than that of leased property, because the person to whom the slave is hired becomes, during the year of hiring, the owner and master of the slave; on him devolves the whole duty, during that time, of treating the slave in such a manner as to avoid the temptation

to run off; to guard, watch, and restrain him, so as to prevent his escape; to prevent improper associations with free negroes, and white persons of bad character, that would be likely to persuade him to run away. He has also the power to remove him from such places as afford facilities for a slave to escape; he has the power, by kind treatment, to prevent a slave from running away.

The plaintiff, as administrator, is compelled by law to hire, without the chance of selecting a master for the slave; and therefore, it is said, policy requires the person hiring to be bound in all courts for the return of the slave: if the slave be cruelly treated, the administrator, or other person, cannot restrain the bailee.

In like manner, if the slave be kept working on the bank of the Mississippi, or on an island of the same, in sight of a free State, (non-slave-holding State, I suppose, is meant,) with all the temptations to escape before him, and all the facilities for effecting such escape, the guardian, &c., cannot prevent this state of things.

Now, there is nothing more plain and obvious, if there be any good reason why a person hiring a slave should not be answerable for the return, under a covenant like this copied into the declaration, than that the plaintiff might either deny the truth of the plea, or that many of the circumstances here suggested by the ingenuity of counsel might be replied in bar to the plea. The case of *Boyce vs. Anderson*, 2 Peters, 150, was an action in the court below, against the defendants in error, owners of the steamboat *Washington*, to recover from them the value of four slaves, the property of the plaintiff, who, he alleged, were drowned by the carelessness, negligence, or mismanagement of the captain and commander of said steamboat. The late Chief Justice Marshall, delivering the opinion of the court, said: "There being no special contract between the parties in this case, the principal question arises on the opinion expressed by the court, that the doctrine of common carriers does not apply to the case of carrying intelligent beings, such as negroes.

"That doctrine is, that the carrier is responsible for every loss not produced by inevitable accident. It has been pressed beyond the general principles which govern the law of bailment by considerations of policy. Can a sound distinction be taken between a human being, in whom another has an interest, and inanimate property?

"A slave has volition and has feelings which cannot be entirely disregarded. These properties cannot be overlooked in conveying him from place to place. He cannot be stowed away as a common package. Not only does humanity forbid the proceeding, but it might endanger his life or health.

"Consequently, this rigorous mode of proceeding cannot safely be adopted, unless stipulated for by special contract. Being left at liberty, he may escape; the carrier has not, and cannot have, the same absolute control over him that he has over inanimate matter. In the nature of things, and in his character, he resembles a passenger, and not a package of goods. It would seem reasonable, therefore, that the responsibility of the carrier should be measured by the law which is applicable to passengers, rather than that which is applicable to the carriage of common goods."

In the spirit of the language above quoted, it may be said, in answer to some

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part of the ingenious argument of the plaintiff's counsel, that Perkins could not have the same absolute control over the hired negro that a lessee of a house has over that inanimate property. He might have subjected himself to an action of trespass on the case, for cruel treatment.

I will add, that if the case of *Ellett vs. Bobb* were one of the first impression, I would now give my support to the rule there laid down.

But the authority of the case of the Supreme Court of the United States, though as much in point as any, is not the only one on this subject; for, let it be recollected, that this bailee of the slave here sued for did not make a contract with the administrator of Nash more binding than the law makes for the common carrier.

At page 154, the same writer (Wheeler) refers to two cases, viz., *Keas vs. Yewell*, 2 Dana, 348, and *Singleton vs. Carroll*, 6 J. J. Marshall, 528, in which the same doctrine is established.

This is the statement of the case of *Keas vs. Yewell*: Yewell filed a bill against Keas to foreclose a mortgage, and upon an order of the court, Keas gave a bond to have the slaves forthcoming to answer the decree. Upon the final decree, one of the slaves not being forthcoming, according to the bond, Yewell sued Keas and his sureties on the bond. The defendant pleaded, that the slave ran away between the execution of the bond and the rendition of the decree, and that they could not reclaim her. Verdict and judgment for plaintiffs, and the defendant brought error.

"*Per curiam*—Nicholas, Judge.—In our estimation, the plea constitutes a valid defence to the action. The casualty by which the slave is lost is a peril incident to the very nature of such property, and therefore, in contracts and covenants concerning such property, that peril should never be presumed to have been intended to be guarded against, unless so expressly stipulated. It has, accordingly, been held by the Court of Appeals in Virginia and by this court, that the hirer of a slave was excused, by the fact of the slave having run away without his fault, from his covenant to return the slave at the end of the year. In *Singleton vs. Carroll*, the covenant of the hirer was as express, unambiguous, and unconditional as that of the parties here.

"The same principle which exempted the hirer from responsibility there, must relieve the obligors in this bond also.

"The principle is laid down in that case, that this loss is not to be considered as provided against by a general covenant, and its happening, therefore, presents the same excuse for non-performance that the death of the slave would have done.

"We therefore think that the court erred in sustaining the demurrer to this plea."

This Court, therefore, feels no hesitation in adhering to the decision made in the case of *Ellett vs. Bobb*; and therefore it is the opinion of the Court, that the pleas of the defendant, which were demurred to in the Circuit Court, are good. Its judgment is therefore reversed, and the cause will be remanded, and the plaintiff have leave to amend his declaration if he desire to do so.

Day vs. Hornbuckle and Ux.

DAY vs. HORNBUCKEL AND UX.

Plaintiff brought an action of assumpsit in the Circuit Court against defendant, and recovered twenty-five dollars: *Held*, that as the suit was properly cognizable before a justice of the peace, the plaintiff could not recover costs, but the costs should have been adjudged against him.

APPEAL from Callaway Circuit Court.

SHELEY and HAYDEN, for Appellant.

TOMPKINS, Judge, delivered the opinion of the Court.

Hornbuckle and Wife brought their action of assumpsit against Samuel Day, in the Circuit Court of Callaway county. Judgment was there given against Day, and, to reverse this judgment, he appeals to this Court.

The declaration consisted of several counts, all of which were common counts. The plea of non-assumpsit was filed, but there was not any notice of set-off. The verdict was for twenty-five dollars, and costs. The defendant, Day, moved the Court to enter up judgment against the plaintiff, because the verdict of the jury was below the jurisdiction of the court. This motion was overruled by the Circuit Court. The second section of the first article of the act to establish justices' courts, gives justices of the peace jurisdiction in all acts founded upon contract, where the amount of the debt, or balance due; or damages claimed exclusive of interest, shall not exceed ninety dollars.

In *Jones & Jones vs. Relfe*, it is assumed, that sums not exceeding ninety dollars are properly cognizable before a justice of the peace in the actions above-mentioned.—See 5 Mo. Rep., 543.

In *Talbot vs. Green*, 6 Mo. Rep., 458, this construction of the statute is questioned, and it is said to be difficult to resist the conclusion drawn from the express words of the act concerning courts, (Revised Code, 155,) that the Circuit Court has jurisdiction where the subject matter in controversy does not exceed, in value, fifty dollars.

So far as the present case is concerned, it is not material which is the proper construction of the law, for it is certainly true that the sum here recovered is not within the jurisdiction of the Circuit Court, and is therefore properly cognizable before a justice of the peace; and in *Hayden vs. Sloan*, 3 Mo. Rep., 329, these words, *properly cognizable*, are considered to be equivalent to *exclusively cognizable*.

It is provided, by the fourth section of the first article of the act to establish justices' courts, that if any suit properly cognizable before a justice of the peace be brought in any court of record, the plaintiff may recover judgment therein, but the costs of suit shall be adjudged against him.—See Digest of 1835, p. 348.

Day vs. Hornbuckle and Ux.—Hughes and Hughes vs. Hughes.

To the same purpose, see the fourteenth section of the act concerning costs, Digest of 1835, p. 129.

The Circuit Court, it seems then, should have adjudged the plaintiffs, Hornbuckle and Wife, to pay costs. Its judgment, therefore, so far as it relates to the costs, is reversed, and that court is required to enter up a judgment for the defendant there, appellant here, for the costs of the suit in that action.

For such purpose, the cause will be remanded.

HUGHES AND HUGHES vs. HUGHES.

Where administrators, who are also heirs at law, sue in the latter character for property belonging to the estate of the deceased, when they might have sued in their representative character, they will not be allowed the costs of such suit out of the estate.

APPEAL from Howard Circuit Court.

LEONARD, for Appellants.

1st: That administrators and executors are to be allowed all costs and expenses by them incurred in the discharge of their duties.

2d: That it is their duty to prosecute all suits and claims in which the personal estate of their intestate, or testator, are interested.

3d: That this suit related as well to the personality as to the reality, and if a decree had been made against the defendant, he would have been required to account and pay over to the administrators the rents and profits of the real and personal estate, and the value of the personal estate charged to have been converted.

TODD, for Appellee.

The appellee, Hughes, insists that the judgment of the Circuit Court was right; 1st: Because the expenses were not incurred in any course of administration of the estate of Sarah Hughes, deceased.

2d: They are not expenses authorized by law to be allowed in administration.—Digest, Mo., p. 58, sec. 9, 10, 11.

3d: The suit was prosecuted in the individual right of complainants, for their own benefit, and not for the use of administrators, or by their order, or by order of the County Court.

Hughes and Hughes vs. Hughes.

4th: The appellants are estopped, by the agreement of compromise, from setting up this account against Joseph Hughes' estate, but bind themselves to pay them.

5th: The demands allowed in favor of complainants were in violation of the statute, the appellants being the creditors and administrators.

TOMPKINS, Judge, delivered the opinion of the Court.

Thomas Hughes and Charles Hughes, as administrators of the estate of Joseph Hughes and of Sarah Hughes, claimed, on the settlement of the estate of said deceased, certain allowances amounting to the sum of \$494 87, which were admitted by the County Court. James Hughes and others, appellees here, appealed to the Circuit Court.

On the record, it appears that, some time in the year 1837, Thomas Hughes and Samuel M. Hughes, Charles Hughes and John Hughes, filed their bill in the Circuit Court of Howard county, on the equity side thereof, stating that James Hughes had become possessed of certain property, real and personal, of their late father, Joseph Hughes, which they prayed the Court to decree the said James to deliver over to the administrators of said Joseph Hughes.

Many other persons, heirs and representatives of said deceased, were made defendants in this bill of complaint. Sarah Hughes, widow of Joseph Hughes, and mother and ancestor of all the parties to the suit in chancery, in the mean time having also died, it appears that she, as well as her husband, left a will, and that there being no executor named in either of said wills, the said Thomas Hughes, one of the complainants in the bill, and Allen Hughes, were appointed administrators, with the will annexed, of Joseph Hughes, and that said Thomas Hughes and Charles Hughes, another of the complainants, were appointed administrators, &c., of Sarah Hughes aforesaid.

This suit in equity was for some time prosecuted, when, a compromise being made, each party agreed to pay their own costs.

The said Thomas Hughes and Charles Hughes afterwards applied to the County Court for allowances for costs incurred in this chancery suit, and they were allowed, in their character of administrators of Sarah Hughes and of Joseph Hughes, the sum of four hundred and ninety-four dollars and eighty-seven cents.

The Circuit Court reversed the judgment of the County Court, and made an order, that the County Court cause the administrators to administer the said sum of money.

The said Thomas Hughes and Charles Hughes appealed from the judgment of the Circuit Court to this Court.

This Court can perceive no reason for reversing the judgment of the Circuit Court. Thomas Hughes and Allen Hughes are the administrators on record of Joseph Hughes, and Thomas and Charles Hughes, of Sarah Hughes.

The complainants in this bill are these two administrators, the one administrator of Joseph Hughes, and both of them administrators of Sarah Hughes and Samuel M. Hughes and John Hughes.

Hughes and Hughes vs. Hughes.—Bragg vs. Brooks.

There is no reason seen why the administrators of Sarah Hughes should join in a bill of this kind, and as little why two of the heirs, Samuel M. and John Hughes, two sons of the deceased, as the record shows, should join with the administrators in suing for the property of the estate; and so far are Thomas and Charles Hughes from suing in their representative characters, that they pray that James Hughes be ordered to deliver over the property in contest to the administrators of Joseph Hughes.

The administrators of Joseph Hughes might have sued in their representative character for any property of the deceased; but having sued as individuals claiming by descent from the deceased, they must pay the costs incurred by them out of their own funds, according to their agreement.

The judgment of the Circuit Court is affirmed.

BRAGG vs. BROOKS.

In actions of trespass, if any damages be found for the plaintiff, he is entitled to recover costs.

APPEAL from Callaway Circuit Court.

LEONARD, *for Appellant.*

In actions of trespass, assault, and battery, in the Circuit Court, if the plaintiff recover any damages, he is entitled to judgment for costs.—Rev. Statutes, title, "Costs," sec. 13; 6 Mo. Rep., 450.

JAMISON, SHELEY, and TODD, *for Appellee.*

1. That it does not appear, by the bill of exceptions, what evidence was before the court on the motion relative to costs; this Court cannot see that the court erred.

2. The evidence on the trial was sufficient to authorize the court to award the costs, as was done.

3. By law, the plaintiff was not entitled to recover his costs on the verdict.

TOMPKINS, *Judge, delivered the opinion of the Court.*

Bragg brought an action of trespass, assault, and battery, against Brooks, and recovered a judgment for one dollar; whereupon, the Circuit Court adjudged each party to pay his own costs. Bragg appeals to this Court, to reverse the judgment.

Bragg vs. Brooks.—Stone vs. Bennett.

The 13th section of the act concerning costs, (see Digest of 1835, p. 129,) provides, that in all actions of trespass, if, upon trial of the issue, any damage be found for the plaintiff, he shall recover his costs.

The judgment of the Circuit Court, then, is reversed, so far as the costs are concerned, and this cause will be remanded to that court, in order that it may enter up judgment for the plaintiff for his costs, in conformity with this opinion.

STONE vs. BENNETT.

1. Where there has been no contract for the payment of interest, an action cannot be sustained for the interest after the payment of the principal; but otherwise, where there has been an express agreement to pay the interest as well as the principal.
2. S. agreed to pay to B. one thousand dollars at the expiration of five years from the date of the agreement, and one hundred and twenty dollars interest, per annum, thereon, during the time, with the privilege of discharging the whole at any time; and further stipulated, that if he should, "at any time before the falling due of said bond, pay any part of it, *he shall be exonerated from interest on that part of the one thousand dollars paid,*" and interest on the remainder should be calculated in the ratio of one hundred and twenty to one thousand. *Held:* That the true construction of this agreement was, that upon the payment of the principal, or any portion thereof, S. would be exonerated from the payment of accruing interest on the principal, or part thereof, paid, but not from the payment of interest that had accrued up to the time of such payment.

APPEAL from Boone Circuit Court.

HAYDEN, KIRTLEY, and GORDON, for Appellant.

1. That the Circuit Court improperly admitted the agreement offered by Bennett to be read in evidence, under the averments and allegations of plaintiff's declaration.—2 Black. Com., 379.
2. That the Circuit Court erred in permitting the deed for the right of way, or entrance to Stone's lot, to be read in evidence to the jury.—2 Black. Com., 379.
3. That the Circuit Court erred in admitting the evidence given by Guitar, that he had left his lots, east of Stone's, unenclosed and open.
4. That the court below improperly refused the instructions offered by Stone's counsel.—3 J. R., 229, Tillotson vs. Proctor; 3 Cow. R., 86, Williams vs. Houghtling; 5 J. R., 267, Johnston vs. Brannan; 13 Wend., 660, Stephens vs. Barringer.

LEONARD, for Appellee.

1. The payment of the thousand dollars, before the maturity of the money bond of the 20th February, 1833, extinguished the annuity of \$120 from that period,

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but did not release the obligors from the payment of so much of the annuity as had already then grown due, and therefore the three first instructions were properly refused.

2. The agreement of the plaintiff and defendant, contained in the article of agreement of February, 1833, are independent of one another, and therefore, even the total omission of the plaintiff to secure the defendant a right of entrance to the back part of the property, would afford no answer to the plaintiff's demand.

3. Admitting, however, that Stone's obligation to pay is dependent on Bennett's agreement to secure the right of way, yet the plaintiff tendered the defendant a reasonable and convenient way, and this was the only obligation imposed upon him by his agreement, and therefore the four last instructions were properly rejected.

4. The proof, by Guitar, that he had, at the request of the plaintiff, left an adjoining lot open and unenclosed, was given in support of the averment in the declaration, that defendant had always enjoyed an entrance to the back part of the lot; and although both the averment and the proof may have been immaterial, yet neither can have prejudiced the defendant, and can, therefore, furnish no ground for reversing the judgment.

NAFTON, Judge, delivered the opinion of the Court.

This was an action of assumpsit, brought by Bennett against Stone, to recover the interest due on a bond given by Stone, which was connected with a written agreement. The agreement was as follows:—"Article of agreement between James H. Bennett, of the first part, and Caleb S. Stone and Caroline Wilson, of the second part, all of the county of Boone, State of Missouri—witnesseth: The said Bennett hereby sells, to the second-mentioned parties, the mercantile house in which C. S. Stone and Nathaniel Wilson are now doing business, in the town of Columbia, situate on lot No. 214, with a front of ground on Broadway-street of twenty-three feet, running back seventy-one feet, with all the buildings and privileges thereon; and the said Bennett also binds himself to secure to the said parties second mentioned an entrance to the property back, by an alley of seven feet: for which the said Caleb Stone hereby obligates himself to execute, for himself and the above party, an obligation for one thousand dollars in gold or silver, payable in five years from the 20th February, 1833, and pay the said Bennett one hundred and twenty dollars per year interest on the paper during the time it runs, with the privilege of lifting said obligation at any time prior to its falling due, if he wishes. Now, if the second party shall pay, at any time prior to the falling due of the above-named bond, any part of it, they should be exonerated from interest on that part of the one thousand dollars which they may pay, and interest per annum, to be calculated on the remainder in the same proportion that one hundred and twenty dollars is to one thousand; the bonds to be passed on the confirmation of the title. Witness our hands and seals, this 20th day of February, 1833.

"JAMES H. BENNETT.

"CALEB S. STONE."

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The bond executed in pursuance of this agreement, was as follows:—

"\$1,000.—On or before the 20th of February, 1838, for value received, we, or either of us, promise to pay unto James H. Bennett one thousand dollars; this bond being subject to an agreement made and entered into this day, in relation to a certain house and lot, now occupied by Stone & Wilson as a mercantile house: this the 20th day of February, 1833.

"CALEB S. STONE. [Seal.]

"CAROLINE WILSON." [Seal.]

The declaration alleged, that, by the article of agreement, it was agreed, that if the party of the second part should pay any portion of the said one thousand dollars prior to its falling due, then they should be exonerated from paying interest on the part so paid from the time of such payment; it further averred, that, on the 20th March, 1839, he, said plaintiff, did offer to convey to Mrs. Wilson and Stone the right of way agreed for, and tendered them a deed for this purpose, which they declined accepting; which deed he brings into court, with a tender to defendants of the same.

The declaration further avers, that, on the 23d of May, 1838, the defendants had paid the principal one thousand dollars, but had failed and refused to pay any interest, and for this suit was brought.

The defendant pleaded the general issue, and several other pleas amounting to the general issue, except the two last, which averred, that Bennett accepted the one thousand dollars in full satisfaction, and acquittance of the obligation.

The issues were found for plaintiff, who had judgment accordingly.

Before considering the proper construction of this agreement, which is the principal matter in dispute between the parties, it is proper to dispose of the question, whether an action can be sustained, for the interest of this bond, after the principal had been paid?

It is a general rule, that an action cannot be sustained for the interest of a demand after the principal has been paid; but this rule is only applicable where there has been no contract for the payment of interest.

In such cases, interest could only be recovered as damages for the non-payment of the principal debt, and therefore, where the debtor accept the full amount agreed to be paid, without saying any thing about interest, such payment is presumed to be in full satisfaction of the demand. But where there has been an express agreement to pay the interest as well as principal, the performance of one part of the agreement is no bar to an action for the non-performance of another part thereof.—*Fake vs. Eddy's Executor*, 15 Wend. R., 76.

The agreement between the parties here is, that the defendant will pay the plaintiff one thousand dollars, at the expiration of five years, from the date of the agreement, and one hundred and twenty dollars interest, per annum, on the paper during the time it runs, with the privilege of discharging the whole at any time; and concludes, that if defendant will pay, "at any time before the falling due of said bond, any part of it, he shall be exonerated from interest on that part of the one thousand dollars paid," and interest on the remainder should be calculated in the ratio of one hundred and twenty to one thousand.

It is contended that this agreement, when properly construed, means that the

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defendant, upon the payment of the principal, or any portion thereof, should not only be absolved from the payment of *accruing* interest, but from the payment of the interest which *had accrued* up to the time of the payment.

This is not, in our opinion, a fair construction of the instrument. Granting that the words used will admit this construction, they will equally justify the construction assumed by the plaintiff, which is, that Stone was only exonerated from the payment of the accruing interest. Which, then, is the most reasonable construction? What rational man would make such an agreement as this would amount to, if we adopt the defendant's construction? According to this understanding of the intent of the parties, the contract is, that the defendant shall pay, at the end of five years, one thousand dollars, and interest at the rate of one hundred and twenty dollars a-year from the date, and then allows the defendant, if he will pay the principal at any time *up to the very day before the bond falls due*, he shall be absolved from all the interest that had accrued. What motive can be assigned for such a bargain? If prompt payment was the object, every inducement is held out to the obligor, by this interpretation of the obligation, to defer his payment until the last moment; for the longer payment is deferred, the greater will be the amount of interest avoided.

If the object was prompt payment at the expiration of the five years, all that portion of the bond relating to the interest from the date is superfluous and unmeaning. It is the duty of the Court to give effect to every clause of a written instrument, if it can be done consistently with the intention of the parties; and language is not to be considered as superfluous, merely because an *implication of law*, from previous clauses, would have rendered it unnecessary. The construction of this clause in the instrument, which limits the meaning of the word "interest" to accruing interest only, gives an operation to that clause, and one which is manifestly consistent with the intent of the parties, and should not therefore be rejected, because the law would have implied as much from previous stipulations in the same agreement.

The testimony and the instructions of the court, in relation to the right of way, which was agreed to be secured to plaintiff, have not been noticed, because we are of opinion that this agreement is entirely independent of defendant's obligation for the money, and was no bar to the plaintiff's right of recovery. It is true, that the performance of the plaintiff's covenant in that particular, was averred in the declaration; proof was introduced to sustain the averment, and the issue was found for the plaintiff.

Whether the issue was well found, will not be inquired into now, because the defendant has not been, in any event, injured by that finding.

To determine whether covenants be dependent or independent, resort must be had to the intentions of the parties, and the principles upon which this intent is to be ascertained are clearly laid down by elementary writers, and recognized by adjudged cases. One of the rules for the construction of covenants is this:—"Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is construed to be an independent covenant." (1 Saun., 320.) This is especially so where the per-

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formance of part has been accepted. (1 Esp., 129.) Here, the covenant for the alley constituted only a part of the consideration for the defendant's bond; the defendant had accepted a deed for the lot, and had taken possession of the lot. The plaintiff's failure or refusal to comply with his covenant, in this particular, would therefore have constituted no reason why he should not recover the consideration money.

The jury calculated interest on the sum of six hundred dollars, which was due at the maturity of the bond, and this is objected to, as an allowance of *interest on interest*. We see no objection to the verdict on this ground. The interest was not compounded whilst the note was running, but when it was due, the interest up to that time became a liquidated debt, upon which damages in the shape of interest were properly charged.

Judgment affirmed.

CASON vs. TATE, NOLLEY & COOK, AND DYER.

1. A justice of the peace cannot grant a new trial after a verdict by a jury.
2. The effect of a judgment, in a justice's court, will be given to the verdict of a jury, as soon as the verdict is entered on the justice's docket: and an appeal must be taken within ten days from the entering of the verdict.

ERROR to Callaway Circuit Court.

SHELEY, for Plaintiff in Error.

1. That, according to well-settled principles, motions in arrest of judgment can only extend to such errors or irregularities in the cause, as appear of record.—See 2 Tidd's Practice, 948, 949; Second part of Archibold's Practice, 280; Stephen on Pleading, 95, 96; 3 Blackstone, side page, 393.

2. That judgment will not be arrested for any errors or defects in the record, except they be such, that without amending, the court could not give a good judgment in the cause; and that no alleged departure of the verdict from the law, or evidence in the cause, can avail upon such motion, and only upon motions for a new trial. (See same references.)

3. That a motion in arrest of judgment after verdict admits all the facts essential to support the declaration, and the finding of the jury, and the court will intend that every material fact alleged, even informally, in the record, or fairly inferrible from it, to have been proven by the plaintiff, upon the trial in support of his action.—See 11 Wend. Rep., 374, 384, 385; 2 Tidd, 949.

4. We shall contend further, that the setting aside the verdict of the first jury by the justice, and granting a new trial, as appears in this record, was such an

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error in his proceedings as may have availed the defendants, had they chosen to have taken advantage of it at the proper time, and in the proper manner; but having taken the appeal to the Circuit Court, and possessed that court of the cause, and after submitting to a trial upon merits, and having a verdict rendered against them, the court will intend the defendants to have waived the objection, and ought to have rendered judgment upon the verdict.—See Rev. Stat., art. 8, sec. 8, p. 370.

5. That, upon an appeal from the justice, the Circuit Court will try the cause anew upon its merits, without regarding, or in any manner attempting to revise or correct any errors or irregularities in the proceedings of the justice, unless such appeal is taken for the purpose of suspending the execution of the judgment until application could be made for some rule against the proceedings of the justice, of the nature of a mandamus, or any other kind, in which case, the party appealing should, at the first term of the Circuit Court next succeeding, move the court to dismiss the appeal, and for such rule as the proper correcting the errors of the justice may require: and in this way alone can the Circuit Court revise or correct any errors or irregularities in the proceedings of the justice. (Same references as above.)

6. That this appeal to the Circuit Court by the defendants, not being intended for such purposes as would seem from the record, the Circuit Court, having tried the cause upon its merits, and a verdict rendered, should have disregarded the error of the justice in setting aside the first verdict, and ought to have rendered judgment upon the verdict of the jury.

LEONARD and ANSELL, for Defendants in Error.

1. That a justice of the peace has no authority to grant a new trial, except in certain specified cases, and that he cannot set aside the verdict of a jury.

2. That a judge is, in contemplation of the law, bound to examine the whole record, and give judgment according to the very right of the cause without regard to the verdict,—issue or no issue.

3. That there are ten days allowed to take an appeal from the magistrate's court, and if they are passed by, the cause is defunct in contemplation of the statute, and no after proceeding can revive it.

4. The plaintiff, by moving for a new trial, instead of taking an appeal, committed a fatal error, which was substantial ground for arresting the judgment.

Authorities:—6 Mo. Rep., 750, *Downing vs. Gurner*; *Stephen's Pleading*, "new trial," 94, "arrest of judgment," 96, 97, "writ of error," 117, 118, 119, 120, "demurrer," 138-152; Stat. Mo., art. 5, sec. 3, &c., article 8, "appeals," 476, &c.; 3 Black., "new trial," "arrest of judgment," 393.

SCOTT, Judge, delivered the opinion of the Court.

Cason brought an action of debt against the defendants in a justice's court, where, on a trial, the jury render a verdict against the plaintiff.

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The justice before whom the cause was tried, granted a new trial, and continued the cause.

On the second trial, the parties appeared, and submitted the cause to the justice, who rendered a judgment for the plaintiff, from which the defendant appealed to the Circuit Court, where, on a trial *de novo*, the plaintiff again obtained a verdict.

The defendants then moved in arrest of judgment, for the reason that the justice had granted a new trial to the plaintiff. This motion was sustained, and the suit was dismissed.

It is a settled principle, that a justice of the peace cannot grant a new trial after a verdict by a jury.—*Downing vs. Garner*, 1 Mo. Rep., 751.

In *Rutherford vs. Winn*, 3 Mo. Rep., 14, this Court held, that in a justices' court, the effect of a judgment will be given to the verdict of a jury so soon as the verdict is entered on the justice's docket. In that case it was held, that the appeal should be taken within ten days from the entering of the verdict.

The justice having no power over the verdict, his proceedings subsequent to its rendition were *coram non judice*, and consequently void. It was insisted, that the cases referred to were decided under the revised laws of 1825, which were less indulgent to proceedings in justices' courts than the present statute, which directs, art. 8, sec. 8, that, upon the return of the justice being filed in the clerk's office, the court shall be possessed of the cause, and shall proceed to hear, try, and determine the same anew, without regarding any error, defect, or other imperfection of the justice. It will not be maintained, that under this section the bare filing of the papers will give the court possession of the cause, without regard to the legality of the steps of the party by whom they are filed.

The law requires the appeal to be taken in ten days. Would the filing of the papers in the Circuit Court, any length of time after a trial before the justice, give the Circuit Court possession of the cause?

A party has a right to an appeal, and if his appeal is properly taken, under the section above referred to, he is entitled to a trial *de novo* in the Circuit Court.

As the transcript of the justice was before the Circuit Court, and as, from its face, it appeared that the verdict first given, which, as we have seen, was equivalent to a judgment, was in full force, notwithstanding there may have been a trial in the Circuit Court, yet when that court, at any time, became satisfied that it was improperly entertaining a cause, it was competent to dismiss it, as was done, and leave the first judgment undisturbed, to be enforced by the party in whose favor it was rendered.

Judgment affirmed.

The State, to use of Boone County, vs. Lowry and Others.

THE STATE, TO USE OF BOONE COUNTY, vs. LOWRY AND OTHERS.

A rescue is not a good return to an execution. The sheriff or constable has the power of summoning the *posse comitatus* to prevent a rescue, and he is responsible if one is effected.

ERROR to Boone Circuit Court.

GORDON and TODD, for Plaintiff in Error.

1. That the levy, by execution, on property by an officer, is evidence of right to it in the defendant; and the defendant gave no evidence of right in the claimant to repel the presumption.

2. That after seizure by an officer, he cannot excuse himself from liability for its value, by reason of any force to seize, or recapture it, than that of a public enemy.—2 Saund. Rep., 343; 5 Burr, 2812; 4 T. Rep., 789; 2 Pick, 304; 2 H. Black., 113; 4 Littell's Reports.

ROLLINS, for Defendants in Error.

For the appellee, we insist, that he was in the active and faithful discharge of his duty, doing all that the law required at his hands; and was guilty of no manner of neglect or negligence, and cannot be chargeable in this action.

NAPTON, Judge, delivered the opinion of the Court.

This was an action of debt, instituted in the Circuit Court of Boone county, on the bond of the defendant and his securities, as constable of Missouri township.

The defendants plead *nil debet*; upon which issue was taken, and a trial had. In consequence of instructions of the court, the plaintiff took a non-suit, and moved to set it aside, because the court had given wrong instructions. This motion was overruled, and the case is brought here by writ of error.

On the trial it appeared, that a *feri facias* issued from the office of Warren Woodson, a justice of the peace, directed to the defendant, Lowry, constable of Missouri township, and that, upon this writ, he made the following return:—"Came to hand this 7th day of March, 1840.—J. S. Lowry, C. M. T. Levied the execution on one boat and load of corn, supposed to be one hundred and thirty or forty barrels, shown to me as the property of W. S. Burch, by Robert T. Todd, the son of R. N. Todd, this 7th March, 1840; and on the 8th day of March, 1840, Stephen Pettus became the claimant of the corn and boat, and demanded a jury. I then summoned Stephen Pettus, Tandy Johnson, Thomas Jefferson, and Isaac Bledsoe, jun., as a guard to guard said boat and corn, till I could get back with a jury, and when I got to the place where I left the boat and corn, it was gone, and

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said guard was gone: this 9th day of March, 1840.—Returned not satisfied.—No other goods and chattels found, whereon to levy, in Missouri township.

"This 21st April, 1840.

"J. S. LOWRY, C. M. T."

The defendants proved, in justification of the constable, that the execution was levied on the property stated in the return on Saturday night; that the claim of Pettus was immediately set up, and that thereupon the constable summoned a guard to watch the boat, until he could summon a jury to try the right of property. This trial was set for the Monday following, upon which day the constable returned with his jury, but found neither boat, corn, or guard.

They further proved, that, on this same morning, (Monday,) the defendant in the execution, (Burch,) with five armed men, took possession of the boat, expelled the guard, cut the boat's cable, and departed down the river; the corn being in the boat, and neither the constable or guard had any means of arresting the boat.

On this state of facts, the plaintiff asked the court to instruct the jury, that the facts proved did not amount to a justification of the constable, but he was liable to the amount of property levied on, which the court refused to give, and thereupon the plaintiff suffered a non-suit.

By the common law, the sheriff could not return that he had levied on goods, but that they were rescued out of his hands; for when the sheriff has levied on goods sufficient to satisfy the execution, there is no remedy against the defendant.

—2 Bac. Abr., title, "Executions."

The sheriff has the power of summoning the *posse comitatus*, to prevent a rescue, and he is responsible if one is effected.

Cases of great hardship may happen, under so rigid a construction of his duties, but the principle is well settled. (O'Neil vs. Marson, 5 Burr, 2812; Elliot vs. Duke of Norfolk, 4 Durn. and East, 789.) The court should have given the instructions asked for by the plaintiff.

Judgment reversed, and cause remanded.

NICHOLS, ADMINISTRATOR, vs. DOUGLASS AND McCULLOCH.

1. An agreement between the creditor and the principal debtor, for delay, or otherwise changing the nature of the contract, to the prejudice of the surety, in order to discharge the latter, must be an agreement having a sufficient consideration, and binding in law upon the parties: therefore, where the creditor merely, and without any consideration, extended the time for the payment of the debt, and made a statement on the back of the bond, of such extension, the surety was not thereby discharged.
2. An endorsement on a bond, made subsequently to its execution, is no part of the bond: otherwise, where the endorsement is made at the time of its execution and delivery.

Nichols, Administrator, vs. Douglass and McCulloch.

ERROR to Callaway Circuit Court.

REED and TODD, for Plaintiff in Error.

I. The plea by McCulloch is not sustainable; because—

1. A court at law cannot entertain jurisdiction of a plea by a security alleging matter in discharge of the bond.

2. The plea sets forth no contract made by the obligee and principal to extend the time for the payment of the debt.

3. There is no consideration plead, as constituting the basis of a contract, and it was a *nudum pactum*.

4. There is no allegation that the extension was for a fixed and definite time.

II. The endorsement on the note was no part of the original note; because—

1. It was not made so by oyer.

2. It was not made by the parties at the time of the execution of the bond.

3. It was the act of the plaintiff by writing, and should have been plead in bar, and the writing proved.

4. If it was a temporary contract of suspension, it was *functus officio*; when suit was brought, the debt was due and recoverable upon the bond.

5. If the endorsement is a contract, it is collateral, and will not avoid the note. —Comyn, "Contracts," 36; 4 Mass. Rep., 414.

SHELEY and HAYDEN, for Defendants in Error.

The court committed no error in overruling said demurrer; because said plea was a good one, and a bar to said plaintiff's recovery against said defendant McCulloch.—See 3 Bibb., *Hughes vs. Sanders*, 360.

Secondly: If said plea is not held good by the Court, the plaintiff cannot recover in this action, because it is a petition in debt, with an averment of letters of administration; this averment being necessary, this form of action cannot be brought. (See *Curle vs. McNutt*, 6 Mo. Dec., 495.) The first defect being in plaintiff's declaration, his demurrer must cut back.

The defendants also insist, that the court committed no error in refusing said note to be read in evidence, because there is a material variance; the one set out in the petition has no assignment on the back of it.

SCOTT, Judge, delivered the opinion of the Court.

The plaintiff sued the defendants by petition in debt, who filed the pleas of *non est factum* and accord and satisfaction. Issue was taken on these pleas.

The defendant McCulloch pleaded, separately, that the intestate, Smith, in his life-time, extended the time for the payment of the money upon the said supposed writing, and fixed upon a further time, at which the money was to become due, than that mentioned in said supposed writing; and that the said William H.

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McCulloch was security upon the said supposed writing for one John Douglass, the other said defendant in this behalf; and that the extension of time so given, as aforesaid, was without the knowledge or consent of the said William H. McCulloch, as security. To this plea there was a demurrer, which was overruled, and a judgment entered for McCulloch. On the trial, the plaintiff offered in evidence, in support of his action, the bond sued on, due four months after date, for the sum of two hundred dollars, and dated 27th May, 1839. On this bond was the following endorsement:—"Next Christmas day this note is due.—January 4th, 1840.—(Signed) Douglass Smith."—To the reading of the bond in evidence the defendant objected, and offered to read the above endorsement in support of his objection, but the court overruled the objection, permitted the endorsement to be read, and then excluded the bond as evidence. The plaintiff excepted, submitted to a non-suit, and moved to set it aside, which motion being overruled, he sued out his writ of error.

The first question arising in the cause is, whether the plea of the security, McCulloch, contained matter sufficient for his discharge from the debt? There is no doubt of the general principle, that if the creditor, without the consent of the surety, will extend the time of payment of the debt by a valid agreement, such an agreement will discharge the security. The security has a right to come into a court of equity, and to sue in the name of the creditor.

Now, if the creditor has given time to his debtor, the surety cannot sue. What is the giving of time? It is not a mere promise of indulgence; it is the act of the creditor, depriving himself of the power of suing, by something obligatory, which prevents the surety from coming into a court of equity for relief, because the principal having tied his own hands, the surety cannot release them. An agreement, to be binding, must have a sufficient consideration. No consideration is alleged in the plea for the promise to give time: such a promise was not obligatory on the person making it, and it did not prevent the creditor from suing instantly.

An agreement between the creditor and the principal debtor, for delay, or otherwise changing the nature of the contract, to the prejudice of the surety, in order to discharge the latter, must be an agreement having a sufficient consideration, and binding in law upon the parties. (*Lemore vs. Powell*, 12 Wheaton, 554.) The court therefore erred in overruling the demurrer. The court permitted an endorsement upon the bond to be read as part of it, and then rejected the bond as evidence, because of the variance.

The authorities are all united, that an endorsement on a bond, made subsequently to its execution, is no part of it.—*Tomlins' Law Dictionary*, title, "Deed," *Sherman vs. Beale*; *Washington R. Williams vs. Handley*, 3 Bibb., 11.

An endorsement made at the time of the execution and delivery of a deed, is a part of it.—*Ibid.*

The endorsement on the bond, in the case before the Court, was made subsequently to its execution, as appears by its date; it was, therefore, no part of the deed, and should have been rejected as evidence.

Let the judgment of the Circuit Court be reversed, and the cause be remanded.

Sisk vs. Evans.—Wills vs. The State.

SISK vs. EVANS.

A. owed B. five dollars, and agreed with him that he would make it ten or nothing, on the presidential election. *Held*: That B. could only recover five dollars; the remainder being for a bet, was illegal, and could not be enforced.

ERROR to Randolph Circuit Court.

VAN ARSDAL and HICKMAN, *for Plaintiff.*

CLARK, *for Defendant.*

NAPTON, *Judge, delivered the opinion of the Court.*

The defendant sued the plaintiff in error, before a justice of the peace, and recovered the sum of ten dollars. On an appeal taken to the Circuit Court of Randolph county, a trial *de novo* was had, and the same recovery was had as before the justice. It appeared on the trial, that plaintiff and defendant were together at a store-house, and defendant (below) said he owed plaintiff five dollars, and would make it ten or nothing, on the presidential election,—to which plaintiff consented. Sisk bet on Van Buren, and Evans on Harrison. Upon this evidence, a verdict for ten dollars was found in favor of the plaintiff, which the court were asked to set aside, but the court refused to set the same aside, or grant a new trial.

Inasmuch as it appeared from the testimony, that a portion of the recovery was had for a bet upon an election, which is illegal, and will not be enforced by the courts, the verdict should have been set aside, and a new trial awarded.

Judgment reversed.

WILLS vs. THE STATE.

Where an indictment contained two counts, on the first of which a *nolle prosequi* was entered, and the time of committing the offence was only averred by reference to the first count, it was held, that the defendant might be tried and convicted on the second count, it not being stricken out, or rendered null, as, perhaps, it would have been upon a demurrer sustained.

Wills vs. The State.—Gudgell and Austin vs. Mead and Others.

ERROR to Ralls Circuit Court.

VAN ARSDAL and HICKMAN, for Plaintiff.

WELLS, for Defendant.

NAPTON, Judge, delivered the opinion of the Court.

The plaintiff in error was indicted by the grand jury of Ralls county, for an assault upon one Samuel Lightner, with intent to kill, and convicted.

The first count in the indictment charged an assault made feloniously, on purpose, and of his malice aforethought, under the 32d section of the act concerning crimes and their punishments.

The second count charged, that said "Wills, on the day and year aforesaid, and in the said county of Ralls," made a felonious assault, with intent feloniously to kill the said Lightner.

On the trial, the Attorney for the State entered a *nolle prosequi* on the first count, and the defendant was tried upon the second count, and found guilty. A motion was made in arrest of judgment, on the ground, that there was no sufficient indictment upon which a judgment could be rendered.

This motion was overruled, and the error insisted on in this Court is, the overruling of said motion.

The second count is supposed to be insufficient, because the time of committing the offence is only averred by reference to the first count, upon which a *nolle prosequi* had been entered.

The force of this objection is not perceived.

The Circuit Attorney declined prosecuting the defendant on the first count; but the count was not therefore stricken out, or rendered null, as, perhaps, it would have been upon a demurrer sustained.

Judgment affirmed.

GUDGELL AND AUSTIN vs. MEAD AND OTHERS.

1. A court of equity has no power to decree a partition of personal chattels between joint-tenants, or tenants in common.
2. An appeal will not lie from a decree of a court of equity, that partition be made between the parties. Such decree is interlocutory.

APPEAL from Livingston Circuit Court.

Scott, Judge, delivered the opinion of the Court.

The appellees filed a bill in chancery against the appellants for a partition of chattels, consisting of an anvil, bellows, vice, hammers, &c.

The appellants demurred to the bill, and their demurrer being overruled, they made no further answer; whereupon the court decreed a partition, and appointed commissioners to make it.

From this decree, the appellants appealed to this Court. The question presented by the record is, whether a partition of personal chattels can be decreed by a court of equity, between joint tenants, or tenants in common.

A writ of partition for joint tenants, or tenants in common, of real estate, did not lie at common law. This writ was given only to parceners, for, as the tenancy in co-parcenary was created by law, so the law gave the tenants a writ of partition.

But, as joint tenants and tenants in common became such by their own act, the law provided no means by which they could obtain a separate interest in that which had become joint and undivided by their own consent.—Coke's Littleton, Thomas' edition, vol. i., 806.

The statutes of 31 and 32 Henry VIII. gave the writ of partition to joint tenants and tenants in common of real estate. The last of these statutes gave the writ to the joint owners of a lease for years. From this it would appear, that, by the common law, the joint owners of chattels had no process for compelling partition.—*Ibid.*

It would be extremely difficult, in many cases, to make partition; many chattels are not susceptible of a division; of such, partition could only be made by allowing each owner to enjoy the chattels, for a given period, alternately.

A power to sell is not incidental to the jurisdiction to make partition.

If partition in kind cannot be made, a court of equity, without the authority of statute law, cannot decree a sale. (Thompson vs. Hardman, 6 John. C. Rep., 436.) In the case of Tinnoo vs. Ginkle, (1 Dessas. R.,) a sale was decreed where partition could not be made advantageously, and the land was *unproductive to the children*.

In Coleman vs. Hutchison, (3 Bibb., 216,) the court said, no case had been found where a sale of the property has been adjudged or decreed, under the doctrine of partition at law, or in equity.

From the manner in which partitions of estates in England have been made, it would seem a court of chancery could not decree a sale; otherwise, modes of partitioning estates so inconvenient as have sometimes been made by her courts of chancery, would never have been submitted to. Take one for example:—A commission of partition of a house having been executed, exceptions were taken, on the ground, that the commissioners had allotted to the plaintiff the whole stack of chimneys, all the fire-places, the only staircase in the house, and all the conveniences of the yard; the exceptions were overruled; the chancellor saying, the did not know how to make a better partition between the parties.—Turner vs. Morgan, 8 Ves.; Manners vs. Charlesworth, 7 Cond. Eng. Chan. Rep., 69.

In 4 Randolph, 95, it is said, "that tenants in common of a personal thing cannot compel partition by proceedings at common law, and therefore, equity has jurisdiction." The point was not made in the cause, and the expression is uttered in argument, and no authorities are cited.

But, with deference, it does seem that the court took the point in dispute for granted. The question is not, what court has jurisdiction? but, whether a partition of things merely personal can be made at all?

We have not been able, after some research, to find a case in which a partition of chattels has been decreed, except leases for years, for which partition was given by the statute. In the case of *Coleman vs. Hutchison*, (3 Bibb., 216,) the court says, "The right of partition of slaves is given by statute. We have no statute allowing partition of mere personal chattels." Abbott, in his work on shipping, part I, chap. iii., sec. 2, says, "A personal chattel, vested in distinct proprietors, cannot possibly be enjoyed advantageously by all, without a common consent and agreement among them. To regulate their enjoyment, in case of disagreement, is one of the hardest tasks in legislation; and it is not without wisdom, that the law of England, in general, declines to interfere in their disputes, leaving it to themselves, either to enjoy their common property by agreement, or to suffer it to remain unenjoyed, or to perish by their dissensions, as the best method of forcing them to a common consent for their common benefit."

Perhaps in analogy to the power exercised by a court of equity, when it winds up the concerns of a partnership, in decreeing a sale of the joint property, and a conversion of it into money; so would such a court, if a bill for an account was brought by one part owner against another, decree a sale of the property of whose profits an account was sought, so as to do complete justice between the parties. (3 Kent, 64.) That such a step would be necessary, seems to follow from the established principle, that a bill brought for an account of partnership transactions is demurrable, unless it prays a dissolution of co-partnership.—*Loxcomb vs. Russell*, 6 Con. Eng. Can. Rep., 4.

In proceedings in partition, both at law and in equity, there are two judgments and decrees; the one interlocutory, and the other final. The first is *quod partitio fiet, inter partes de tenementis*, upon which a writ, or commission, goes, commanding that partition be made, and upon the return of this writ, or commission, executed, if the proceedings are approved by the court, the second judgment is given—*quod partitio firma, et stabilis in perpetuum teneatur*. This is the principal judgment, and before it is given, no writ of error does lie.—*Thomas' Coke*, vol. i., 807, 808.

The appellants took their appeal before a final decree was entered; it was an interlocutory decree, not final. No partition had, in fact, been made; there was only a decree requiring it to be done, and no further proceedings were had under it when they took their appeal.

The appeal, then, must be dismissed, at the costs of the appellants, and the cause be remanded, with directions to dismiss the bill, at the costs of the complainants.

Davis vs. Davis.

DAVIS vs. DAVIS.

1. Where the Circuit Court improperly grants a new trial, and the party complaining wishes to avail himself of the error, he should tender his bill of exceptions, and abandon the case at that point, otherwise he cannot assign for error the granting of the new trial.
2. Where a testator omits in his will to make a disposition of a part of his property, or where it is ambiguous upon the face of the will what disposition he intended to make of such part, parol evidence is inadmissible to show that the testator intended to give such part of his estate to a particular heir.

APPEAL from the Boone Circuit Court.

KIRTLEY, for Appellant.

1. That the Circuit Court erred in setting aside the order of the County Court, and granting a new trial; for the bill of exceptions taken in the County Court was so wholly defective, that the Circuit Court could, by nothing on the record, determine whether the County Court decided right or wrong.—See Laws of Missouri of 1835, sec. 6, p. 63, and sec. 8, p. 64; 7 Mo. Rep., 4; 4 Mo. Rep., 18, Foster and Nowland, and 626, Searcy vs. Devine; 5 Mo. Rep., 110.

2. That the Circuit Court erred in rejecting the testimony offered on the trial in that court by the appellant.—See 3 J. J. Marshall, 238, Whitaker vs. Blair; 2 Rope on Leg., 322, Do. from 505 to 513.

3. That the finding and judgment of the Circuit Court is wholly insufficient and defective, and does not determine the rights of the parties.—See section 8, p. 64, Laws Mo., 1835.

TODD, for Appellee.

1. That there is no bequest in the will of the residuum of the estate to the appellant, either as a legatee, or as executor.

2. That parol evidence is not admissible to enlarge, or vary the terms of the will.—Fonb. Eq., 172, note; *Ibid.*, 339; 1 Johns. C. Rep., 234; 2 Marshall, 51.

TOMPKINS, Judge, delivered the opinion of the Court.

John Ellis, administrator, with the will annexed, of Samuel Davis, at the May term of the County Court for Boone county, in the year 1841, made his annual settlement, and there was found in his hands, after the settlement of all demands against the estate of the deceased, the sum of \$750; whereupon, the record states, William M. Davis came into court, and moved the court to make an order on the administrator to pay the same over to him, and as evidence of his right, read to the court the last will and testament of Samuel Davis, deceased, which is in the words and figures following, to wit:—

Davis vs. Davis.

"Florida, November the first, in the year of our Lord one thousand eight hundred and thirty-seven; being of sound mind and understanding, make this my will and testament, after committing my soul to the hands of God:—1st. I will that Wm. M. Davis, of the county of Boone and State of Missouri, be my executor, and sell my land in the county aforesaid, and pay all dues and lawful demands, and then pay to each of my brothers and sisters fifty dollars: 2d. I will that Rachel Martin have all my things that remain with her: 3d. I will that John Ellis receive my — in the service in which I am engaged, pay the same over to William M. Davis, and what remains with me: 4th. I will that the business in which I am engaged, of Jane Wiley, deceased, be given up to G. Winant.

"Given under," &c.

The record then shows the will duly proved and recorded; and then it shows, that John Davis and others were admitted to be brothers and sisters of the deceased; that the brothers and sisters of the deceased were his only legal representatives, and they moved the court to make an order distributing the estate equally among the heirs at law: whereupon the court made an order, directing the administrator to pay over the said sum of \$750 to the said William M. Davis. The order is then set out at large, and the clerk certifies, that it is a true copy of the record, and that the losing party excepted. The record above, set out in substance, is then copied over again literally, into what is called a bill of exceptions. The affidavit for an appeal, and appeal bond, are also set out.

When the cause came into the Circuit Court, the appellant moved the court to set aside the judgment of the County Court, and grant a new trial.

Davis appeared by counsel, and opposed the motion. The Circuit Court set aside the judgment of the County Court, and granted the appellants a new trial. William M. Davis, appellee there, and appellant here, excepted to the decision of the court. The new trial was had; William M. Davis, appellant here, attended, and an order was made by the Circuit Court, that the administrator proceed to distribute the money which the County Court had directed to be paid to William M. Davis, among the legal representatives of the deceased. The appellant, Wm. M. Davis, excepted, and moved for a new trial.

In the bill of exceptions, it appears, that Davis, appellant, gave in evidence the will of the deceased, and then offered evidence to prove that the deceased died in Florida, but resided in Boone county; that he was his youngest brother, was a favorite, and raised by deceased in his family: that the deceased was a bachelor, without children; and that, at time of making his will, it was his intention to devise away the whole estate, and not to leave a residue undevise.

The Circuit Court refused to admit this evidence, and the appellant, Davis, excepted, and moved for a new trial, as above-mentioned. It is assigned for error—

1. That the Circuit Court erred in setting aside the judgment of the County Court, and in granting the appellee a new trial.

2. That the Circuit Court erred in rejecting the testimony offered by the appellant.

3. That the Circuit Court committed error in the judgment which it gave.

4. The Circuit Court should have found the amount to be distributed, instead of making the general order entered up.

1st: If we admit that the Circuit Court committed error in setting aside the judgment of the County Court, yet still, if the other party wished to avail himself of such error, he should not have made defence in the new trial before the Circuit Court, but he should, after taking his exceptions, have abandoned the case at that point. By going on to a second trial in the Circuit Court, he has the choice of two verdicts if he get a verdict in that court; and, according to his construction of the act of the Assembly, he may avail himself of the judgment of the County Court, and when he gains the other verdict in Circuit Court, he may avail himself of the construction given by himself, and also of that given by his adversaries, to choose the most profitable of the two, a species of gambling not allowed in a court of justice.

The act reads thus:—

“On every such appeal, the Circuit Court shall determine the points or decisions excepted to; and if it be of opinion that the County Court erred on any material question of law, or fact, a new trial shall be granted, which shall be had in the Circuit Court in the same manner, and the same order or decision shall be made as the County Court ought to have made.”—See section 8, p. 63, of the Digest of 1835.

2d: In 3 Phillips' Ev., 1360, it is said, some patent ambiguities then, it appears, allow a resort to extrinsic evidence, and others do not. The latter class only seem appropriately to belong to the *ambiguitas patens* of Lord Bacon designated in the text, p. 531.

“An ambiguity is patent in this sense, when a mere perusal of the instrument shows plainly that something should be added, before the reader can determine which, of several things, is meant by it, and then the rule is inflexible, that no evidence to supply the deficiency can be admitted.”

To permit William M. Davis to introduce the evidence offered by him, to prove that the deceased intended to give this sum of \$750 to him, is to allow him to make a will for the deceased. For the will which he wished to establish for the deceased, as to this sum not disposed of in the written will, is to be inferred from the circumstances that the deceased died in Florida, but resided in Boone county; that the appellant was the youngest brother, a favorite, raised by the deceased; that the deceased was a bachelor, &c.; that at the time of making his will, he intended to dispose of his estate, and not leave a residue undisposed of; and lastly, he offered evidence conducing to show that the testator intended that he, the appellant, should have the residuary interest.

Now, if William M. Davis had offered to prove, by the most positive declarations of the deceased on his death-bed, that he was to have this residuum, the statute, in the clearest language, declares that the will shall be in writing. There is not in this will even the *ambiguitas patens* of Lord Bacon above-mentioned; but here is an entire defect of evidence in the will, as to the intention of the testator to make any disposition of the sum of money above-mentioned.

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Davis vs. Davis.—Cornelius et al. vs. Grant and Abbott.

3d: The third error assigned must share the fate of the second, for it appears on the record, that the foundation of the claim of the appellant is the will which, on its face, shows, as it seems to this Court, that the claim of the appellant is groundless.

4th: The eighth section of the eighth article of the act concerning executors and administrators, which was above recited, directs the same order or decision to be made by the Circuit Court, on appeal, which the County Court ought to have made. The sufficiency of this will, and the extrinsic evidence offered to support the claim of Davis, to the property undisposed of by the testator, was the matter decided on in the County Court, and the duty of the Circuit Court was, to decide the same matter on this appeal, and nothing more was to be decided by it. It not appearing that the Circuit Court has committed any of the errors assigned, its judgment is affirmed.

NAPTON, *Judge*.—I concur in affirming the judgment, but give no opinion as to the proper course to be pursued by a party wishing to avail himself of the error of the Circuit judge, in granting a new trial to his adversary.

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CORNELIUS ET AL. vs. GRANT AND ABBOTT.

1. Under the second section of the "act for securing liens to mechanics and others," (R. S. 1835, 108,) the account of the demand of the party, when filed, becomes a part of the record, and stands in place of a declaration.
2. In proceedings under this act to enforce the lien, the defendants cannot give evidence of a special contract by the plaintiffs with other persons, at the same time, and for like work, at a much less price; but the defendants may give evidence of the general and most common price of like work, at the time the contract was entered into, or the work done.
3. A party will not be allowed to urge in the Supreme Court a point that was not made in the Circuit Court.
4. The Circuit Court may permit jurors to take with them, when they retire to consider of their verdict, such papers, given in evidence, as may be useful to them in making up their verdict.
5. Under the second section of the above act, the account of the demand of the plaintiff, filed according to the provisions of this section, is evidence of the lien. The abstract made by the clerk, under the third section, is not primary evidence of the lien, and the omission of the clerk to make this abstract will not effect the lien.

Cornelius et al. vs. Grant and Abbott.

APPEAL from Boone Circuit Court.

Todd, for Appellant.

To reverse the judgment in this cause, the appellants rely on these points:—

1. That, to establish a lien for the plaintiffs, the clerk's record of such lien is the best evidence, and no secondary evidence can be given, unless the absence of the other is accounted for.
2. That, on an inquiry of general assumpsit, counts for work done, evidence of a special contract by the same workmen, at the same time, and for like work, at a much less price, is competent evidence.
3. There was evidence conducing to show a special agreement between one of the plaintiffs, before the partnership, and Cornelius, to do the work, and that the work was done under it. In law, the plaintiffs could not recover in a joint action, and the court erred in not giving the instruction.
4. That, if there was such contract, the plaintiffs could not recover in the action, without setting forth such contract specially, and suing upon it.
5. That the verdict was given, and judgment rendered, without any evidence to show that any of the defendants, other than Cornelius, were the owners and possessors of the house at the time of suit brought, as alleged in the writ.
6. There is no allegation in the lien filed, of any contract with the owner of the house, for the plaintiffs to furnish materials, and to do the plasterers' work.
7. There is no allegation in the lien filed, of the time when the demand accrued to the plaintiffs, and whether the demand was by special contract, or otherwise.
8. That the written evidence of the lien given in evidence should not have been allowed to the jury, to influence them in their retirement.
9. There is no evidence of any lien of record or on file in the Court.

ROBARDS, for Appellee.

It is urged, that the judgment below be affirmed, for the following reasons:—

1. Because there is no material error in the proceedings below. The court below did right in refusing the instruction asked by the defendants, because there was no testimony to justify the instruction.
2. There was no evidence, either admitted to, or excluded from the jury, which could possibly prejudice the appellants in this cause. (See transcript.)
3. The verdict is supported by the testimony given in the cause, and by the law.
4. The court did right in overruling the defendant's (below) motion in arrest.—See Mo. Dig., 1835, p. 468, sec. 7.

TOMPKINS, Judge, delivered the opinion of the Court.

On the 4th day of December, in the year 1841, John Grant and Samuel Abbott

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filed, in the office of the clerk of the Circuit Court of Boone county, an account against William Cornelius, for work done on a house, and materials furnished for said Cornelius. The account, consisting of several particulars, amounted to \$414 05. Cornelius was credited with \$43 28, and at the foot of the account was this statement: "Balance, after allowing all credits and effects, \$370 77."

Then followed the affidavit, that the above is a true and just account against William Cornelius, and that the said account has accrued within the six months last past, before the filing of this account; and that the house, upon which the work was done, is situated in the town of Columbia, in the county of Boone, upon lot No. 99 of said town; and the plaintiffs pray that their above account may be held and considered a lien upon such property, &c.

The clerk of the Circuit Court then issued a *scire facias*, stating, that whereas Samuel Abbott and John Grant filed, in the office of the clerk of the Circuit Court of Boone county, an account for work and labor done as plasterers, on a building owned at the time by one William Cornelius, but now owned by one Moses U. Payne et al., &c.

The defendants pleaded *nil debet* and *non-assumpsit*, and, on trial, judgment was given for the plaintiffs, and their damages assessed to \$370. The defendants moved for a new trial, assigning for reason—

1. That the court permitted illegal evidence to go to the jury.
2. That the court excluded competent evidence offered by the defendants.
3. That the court refused to give instructions which ought to have been given.
4. That the verdict was against law and evidence.

On the trial of the cause, the plaintiffs offered in evidence the account of their demand above-mentioned to have been filed with the clerk of the Circuit Court. The defendants objected to the reading of it in evidence; the court overruled the objection; and the defendants excepted to the decision.

On the part of the plaintiffs, evidence was given, that they worked as partners on the house of Cornelius, and furnished materials.

A witness stated, that Grant, one of the plaintiffs, in the year 1840, before Abbott came to the country, and before he was a partner, made the contract with Cornelius, to do the plasterer's work to the house; the price of the work he did not know, but he understood from Grant and Cornelius, that Grant was to go on, and do what Cornelius wished him to do, and when Cornelius wished him to stop he was to do so, as part only was to be done that fall. Some work was done before Abbott came to work, but while they were partners, on the inside of the building; some of the inside plastering was done that season, the remaining part in the year 1841. Abbott joined Grant in the work, and they worked together in doing all of the inside plastering; and Cornelius told witness that he preferred Abbott, as being the best workman. The witness saw the work after it was done, and thought it was done as well as work is usually done in this country. Several witnesses stated that the work was done by the plaintiffs, and that Cornelius superintended the work as owner of the house, and that the common price of such work was 37½ cents per yard.

On the part of the defendant, evidence was given to prove the work badly done,

and that the plaintiffs had done a job of the same kind of work for twenty cents per yard.

The court excluded the evidence of the plaintiffs having done work at twenty cents per yard, and the defendants excepted to the opinion in that respect.

The defendants moved the court to give the instruction following:

If the jury believe that the contract for the plastering in controversy was made in the fall, 1840, between Cornelius and the plaintiff, Grant, then the plaintiffs cannot recover in this action, and they will find for the defendants. The plaintiffs objected, and the court refused the instruction, and the defendants excepted.

When the jury were about to retire, the plaintiffs moved the court that the jury be permitted to take out with them the paper writing first above-mentioned, *i. e.*, the account of the demand filed as above-mentioned, to entitle them to a lien on the property. The court permitted it to be done, and the defendants excepted.

The appellants make these points:—

1st: That, to establish a lien for the plaintiffs, the clerk's record of such lien is the best evidence, and no secondary evidence can be given, unless the absence of the other can be accounted for.

2d: That, on an inquiry of general assumpsit, counts for work done, evidence of a special contract by the same workman, at the same time, and for like work, at a much less price, is competent evidence.

3d: That, if there was evidence conducing to show a special agreement between one of the plaintiffs, before the partnership, and Cornelius, to do the work, and that the work was done under it, in law, the plaintiff could not recover in a joint action, and the court erred in not giving the instruction.

4th: That, if there was such contract, the plaintiffs could not recover in the action, without setting forth such contract specially, and suing on it.

5th: That the verdict was given, and judgment entered up, without any evidence to show that any of the defendants, other than Cornelius, were the owners or possessors of the house at the time of the suit brought.

6th: There was no allegation in the bill filed, of any contract with the owner of the house for the plaintiff to furnish materials, and to do the plasterer's work.

7th: There was no allegation in the lien filed, of the time when the demand accrued to the plaintiffs, and whether the demand was by special contract or otherwise.

8th: That the written evidence of the lien given in evidence should not have been allowed to the jury, to influence them in their retirement.

9th: There is no evidence of any lien of record or on file in the court.

1st Point.—The second section of the act for securing liens to mechanics and others, is in these words:—

"It shall be the duty of every person who wishes to avail himself of the benefit of this act, to file with the clerk of the Circuit Court of the county in which the building or buildings to be charged with the lien is or are situated, and within six months after such demand shall have accrued, a just and true account of the demand justly due him, after all just credits given, which is to be a lien upon such building or buildings; and to verify the said account by his own, or by the oath

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of some other person; and also to file, at the same time, a correct description of the property to be charged with said lien."

In the second section, the clerk is required to make an abstract thereof in a book to be kept for that purpose, containing the name of the person imposing the lien, and of him against whom, or on whose property the same is imposed, the amount of said lien, and the description of the property to be charged. The fourth section gives the right of commencing suit in such case, in the ordinary form; and the sixth section gives the person imposing the lien the choice of proceeding by *scire facias*.

The eighth section directs, that no lien shall bind any building for a longer time than twelve months after such building is finished, unless a suit shall have been brought on such lien in the manner provided by this act. And the fourth section gives to the Court the power of deciding the proportionable part of each party claiming a lien on the property.

The abstract of the account of the demand, required, by the second section, to be filed by the person wishing to avail himself of the benefit of this act, is what, I suppose, the defendant's counsel calls the record of the lien. The object of the abstract appears, from the provisions in the several sections above set out, to be, first, to compel the mechanic to be diligent in the pursuit of his claim, by putting it in the power of others, having a right to a lien, to see his claim set out in the book containing the abstracts; second, to enable the court to see, at one glance, all the different claims filed, and to decide to what proportionable part each claimant is entitled.

It cannot be contended, that this abstract can impart as full notice to the owners of the house as the account of the demand required by this act to be filed. For what reason the counsel contends that the account of the demand filed in this case is not a record of the court, or on what authority he maintains his position, we are not told. The act, as above shown, gives the plaintiff the right to proceed either in the ordinary form, (as at common law,) or by *scire facias*. In the proceeding by *scire facias*, the account of the demand stands in place of a declaration, and is as much a record as a declaration becomes after filing.

The first point, then, contains nothing, as it appears to me, in favor of the defendants, appellants here.

Second.—It is the opinion of the Court, that the defendants ought to have given evidence of the general and most common price of work: the plaintiffs might, for special reason, have been willing to do the work for one man at a much lower price than for another; and even if they had made a bad bargain in doing work at too low a price, for a man whom they did not desire to favor, that is no reason why they should, on such a contract as this, be compelled to work at the same price a second time.

Third.—There certainly was evidence conducing to show that a contract was made betwixt Cornelius and one of the plaintiffs to do this work.

One of the witnesses stated, that Grant, one of the plaintiffs, in the year 1840, before Abbott, the other plaintiff, came to the country, and before he was a partner, made the contract with Cornelius to do the work; but it also appeared, that no

Cornelius et al. vs. Grant and Abbott.

work was done on the house, by either Grant or Abbott, until they were partners. Several witnesses stated that Cornelius was present, and superintended the work, as owner; and one of them stated, that Cornelius said he preferred Abbott, as being the best workman of the two. The jury might then well have found that the work was done under an implied contract between Cornelius, on the one part, and Grant and Abbott, on the other part, believing that the first contract made by, Cornelius and Grant, was abandoned.

Fourth.—The fourth point seems to be equally groundless as the third, and for the same reason.

Fifth.—On this point it is sufficient to say, that the point was not made before the Circuit Court. In the 31st section of the act to regulate practice in the Supreme Court, it is provided, that “no exception shall be taken, in an appeal or writ of error, except such as shall have been expressly decided in such court.”

Had the question been made there, the evidence might, perhaps, have been easily supplied; and the Court would have permitted it to be introduced on terms, that the defendants should not be delayed. In all probability, it was overlooked, because the proof could have been easily made, and the fact was notorious.

Seventh.—There was no allegation in the lien filed. The law required the account of the demand to be filed, and the sixth section of the act to secure liens, &c., p. 108, of the Digest of 1835, permits the claimant to proceed by *scire facias*. If the claimant had proceeded under the fourth section, his declaration must have been framed according to the common law rules; but in the mode here pursued, the account of the demand required to be filed was well enough, as it is found in this proceeding.

Eighth, and Ninth.—It is a new doctrine, that a jury ought not to be permitted to take out with them the papers given in evidence on the trial of the cause: it might very often be impossible for them, without the aid of the accounts given in evidence, to make up a verdict. As no authority has been produced to sustain this eighth point, I shall here leave it.

As to the ninth point, it is sufficient to refer to the second section of the act, which makes a just and true account of the demand, &c., filed with the clerk, verified by the oath of the plaintiff, evidence of the lien. The clerk's abstract is a thing totally different. He might be guilty of a very gross neglect of duty if he did not make it; but it is idle to suppose that the plaintiffs, after doing all required of them by the law, and all that they could do, should lose their lien by the neglect of the clerk to perform a duty, the object of which, as above shown, is to enable the Court to decide what proportionable part of the property shall be charged with the demand of each person who may entitle himself to a lien on the property, by filing the account of his demand.

The judgment of the Circuit Court is affirmed.

HAMMOND vs. THE ST. LOUIS PUBLIC SCHOOLS.

Ejectment:—The plaintiff, "The St. Louis Public Schools," claimed the land in controversy under the act of Congress of 13th June, 1812, entitled, "An act making further provision for settling the claims to lands in the territory of Missouri," and the act supplementary thereto, of May 26th, 1824; the first of which acts confirmed to the inhabitants of the town of St. Louis, &c., their rights, titles and claims to town or village lots, out-lots and common-field lots, in said town, which had been inhabited, cultivated, or possessed prior to the 20th December, 1803, and also "reserved" all town or village lots, out-lots, or common-field lots not rightfully owned or claimed by private individuals, for the support of schools in the respective towns and villages; under the last of which acts, the land in controversy was designated and set apart to the plaintiff, for the use of schools.

Defendant claimed the property under Madame Lachaisse, who had exhibited her claims to the first board of commissioners, under a concession which was, by the board, rejected. Afterwards, the recorder of land titles, under the act of 13th June, 1812, reported the claim to Congress for confirmation, and it was confirmed by the act of 29th April, 1816. *Held*:

1. That the second section of the act of 13th June, 1812, which reserves vacant lots for the use of schools, does not pass the legal title to the property so reserved, from the United States.
2. That, under this section, the power to determine in favor of an individual, that he is the rightful claimant of a lot, and that it is not embraced in the reservation, is retained by the Government.
3. That the claim of Madame Lachaisse having been confirmed by the act of 29th April, 1816, the fee passed by that act, and the reservation for the use of schools no longer applied to the property.

TOMPKINS, *Judge*, delivered a separate opinion, embracing other questions than those decided by the Court.

APPEAL from St. Louis Court of Common Pleas.

SPALDING, *for Appellant*.

POINTS FOR THE APPELLANT.

1. The plaintiff below had right of possession only of such land as was reserved for the use of schools in the second section of the act of Congress of 13th June, 1812, "making further provision for settling the claims to land in the territory of Missouri."—2 Story's Laws, 1257, act of 13th June, 1812; 3 Story's Laws, 1972, act of 26th May, 1824; 4 Story's Laws, 2220, act of 27th Jan., 1831; Act of General Assembly of Missouri of Feb. 13th, 1833, p. 37.

2. The lands reserved for the use of schools by the second section of the act of Congress of 13th June, 1812, are confined to what was either a *town* or *village lot*, *out-lot*, or *common-field lot*, on 20th December, 1803.—6 Miss. Rep., 292-4, 297; 3 Story's Laws, 1792, sec. 2.

3. If the reservation in the second section of the act of 13th June, 1812, embraces town or village lots, out-lots, and common-field lots of the respective towns, as they were at the date of the passage of that act, it is yet to be confined to the *towns* or *villages*, properly so called, and does not refer to the limits of them

as incorporated under the American government, which, as in the case of St. Louis may contain several square miles of land lying in the neighborhood of the town proper.—Hempstead's Digest, 256; "An act concerning towns in this territory," passed June 18, 1808.

4. Margaret Lachaisse acquired a title to the land in question by the acts of the recorder of land titles, ratified by the act of Congress of 29th April, 1816.—3 Story's Laws, 1604; 1 Miss. Reports, 777.

The second section of act 13th June, 1812, does not take away the right from Congress of passing the title of the land therein reserved. Said section does not reserve the land in question, because it was "rightfully claimed" by Madame Lachaisse, under a Spanish grant.

5. The doctrine applied in the case of Wilcox vs. Jackson, in 13 Peters' Rep., 511, is not applicable here: that was, that the ministerial officer could not sell lands reserved from sale by law. But here Congress itself has removed its own prohibition, if the second section of the act of 13th June, 1812, embraced the ground in question.—2d vol. State Papers, "Public Lands," 388-559; 563-603, for "Commissioner's Reports;" 3d vol. State Papers, 274, "Recorder's Reports," the first part thereof, containing village claims, &c.; *Ibid.*, 293, second part; *Ibid.*, 276 and 280.

6. The reservation in second section of act of 13th June, 1812, is not a *dedication* to public use, but is merely an expression of the benevolent intention of the Government; it is a mere reservation. All the instances of *dedication* are of *designated* pieces of property, and of property *used* for the public in some particular mode; and the party, in such cases, is estopped from resuming the land *dedicated*, inasmuch as the *interests* of others, third persons, have become vested on the faith of such dedication.—10 Peters' Rep., 720; 6 Peters' Rep., 438.

GEYER and GAMBLE, for Appellees.

The appellees rely upon the following points and authorities:—

1. The record of the proceedings of the Court of Common Pleas, being duly certified, is in its nature competent, and it is relevant to the issue, to ascertain the limits of the town of St. Louis on the 13th June, 1812, since it is to the then inhabitants that grants are made by the first section, and the reservation in the second section is for the support of schools in the town, not as it was at any antecedent period, but as it was when the act passed: and, moreover, the survey to be made by the first section is to be the out-boundary lines of the town, (as it then was) to be extended, if necessary, so as to include out-lots, &c., belonging thereto.—2 Story's Laws U. S., 1257.

2. The plats and surveys given in evidence by the plaintiffs, and objected to by the defendant, are "copies of plats and surveys," required by law to be deposited and kept in the office of the surveyor of the lands of the United States in this State. (Story's Laws U. S., vol. ii., 1257; vol. iii., 1973; vol. iv., 2220.) They were duly certified by said surveyor, and, therefore, must be received in evidence.—Revised Code Missouri, 1835, p. 251.

3. The letter of instructions, by the commissioner to the surveyor, is written under the authority of law. (Story's Laws U. S., vol. ii., 1257; iii., 1973.) The original is a paper required by law to be deposited and kept in the office of surveyor; a copy, duly certified by him, is competent evidence. (Rev. Code, 1835, 251.) The original is a public document, and, as such, cannot be removed from one place to another, nor the production in court compelled, and a copy is there, when proved, as in this case, competent evidence. (1 Starkie's Ev., 156, 7, 160, 1.)

On general principles of law, a copy of a paper given by a public officer whose duty it is to keep the originals, ought to be received in evidence.—United States *vs.* Perkman, 7 Peters, 53.

4. The documents objected to by the defendant, being duly authenticated, were competent evidence; and if there be anything in either of them incompetent or irrelevant to the issue, that matter ought to have been specially objected to.

5. The act of the 13th June, 1812, disposes of all the lots, out-lots, and common-field lots, and commons, in, adjoining to, and belonging to the town of St. Louis, included within the out-boundaries of the survey directed to be made by the first section of the act, and which had not before been granted or confirmed by the board of commissioners. Those lots which were inhabited, cultivated, or possessed prior to the 20th December, 1803, it grants to individual claimants, and all others it reserves for the support of schools, subject, however, to a selection by the president for military purposes.—Story's Laws U. S., vol. ii., p. 1257.

6. The act of the 13th June, 1812, contemplated no further action by the recorder in relation to lots; whatever lots Congress intended to be confirmed, are confirmed by the first section of the act *proprio vigore*, and all not confirmed by that section are reserved by the second section. The recorder had no power whatever over these lots.—Benton *vs.* Vasseur, 1 Mo. Dec., 300; Strother *vs.* Lucas, 12 Peters, 454.

7. If no portion of the piece of ground in controversy was a lot before the 20th Dec., 1803, as supposed in the fourth instruction asked for by the defendant, it would follow, that Mad. Lachaisse could have no title to it under the act of 13th June, 1812; (see Newman *vs.* Lawless, decided by this Court;) but it would that the defendant was entitled to a verdict. The second section refers to the *then present*; the language is, "lots, &c., included within such survey, which are not rightfully owned or claimed by any private individual, &c., are reserved for the use of schools." A piece of ground which was not a lot in 1803, therefore, though inhabited and cultivated prior to that period, becomes a school lot precisely for the reason that it cannot be rightfully claimed as the lot of an individual.

8. If the piece of ground in controversy was not a lot of either description in 1803, which is probable, since the ground between the two fortifications was kept vacant under a reservation for military purposes, yet, if the certificate of Soulard, given in evidence by the defendant, proves any thing, it proves that Main-street extended along the whole front of the ground, and that a cross street, also, was to be located there; so that the ground in controversy was then a lot, and it is proved that it was a lot in 1809 or 10, whether a town lot or out-lot is immaterial.

9. Whether the land in controversy is to be regarded as having been a lot in 1803, or otherwise, is immaterial, since it was not inhabited, cultivated, or possessed prior to 20th December, was not confirmed to any one by the commissioners, nor held by a complete grant, and, consequently, was "not rightfully owned or claimed by any private individual" on the 13th June, 1812, and is therefore reserved by the second section, and appropriated to the purposes therein declared.

10. On the 13th June, 1812, the ground in controversy was a lot, separated by established boundaries from all other lands. A piece of land with defined boundaries, whatever its shape, is a lot; and this was bounded, as all the lots east of Main-street are, west by Main-street; on one side by a street, and on the other by the land of some other persons, and east by the river; and not being then rightfully claimed by any individual, is appropriated to the uses expressed in the second section.

11. Every statute ought to be construed according to the intent thereof of the legislature, rather than the letter. (3 M. & S., 510; 2 T. Rep., 161; *The People vs. Union Ins. Comp.*, 15 John. Rep., 358.) A thing within the intention is as much within the statute, as if it were within the letter; (Bac. Abr., tit., "Statute," letter I., *Coonce vs. Munday*, 3d vol. Mo. Dec., 373; *Ibid.*, p. 496;) applying these rules to the interpretation of the act of 13th June, 1812, that all lands within the out-boundary of the survey directed by the first section, which were not, on the 13th June, 1812, rightfully claimed or owned by any individual, are reserved for the declared purposes. This appears, by excepting the commons, which certainly might well be said not to be a village lot, out-lot, or common-field lot; but the exception shows that Congress understood that the commons would have been within the appropriation, if not excepted. The object of the appropriation shows the intent of Congress to reserve all vacant lands.

12. The recorder of land titles had no authority to select lands confirmed by the act of 1812, or appropriated by it. His selection and confirmation of Mad. Lachaisse's claim is a mere nullity. (1 Mo. Dec., 300; 12 Peters, 454.) The act of the recorder vested in Mad. Lachaisse, and those claiming under her, no better title than they had previously.

13. The second section of the act of 13th June, 1812, made an appropriation of all the lands within the boundary of the survey directed by the first section, not rightfully claimed by individuals, or held as commons, and from that moment the land thus appropriated became severed from the mass of the public lands, and no subsequent law, proclamation, or sale will be construed to embrace or operate upon it, (*Wilcox vs. Lessee of McConnell*, 13 Peters, 490,) and therefore the recorder not only had no power over it, but, if his recommendation is embraced in the report confirmed by the act of April, 1816, that act will not be construed to confirm the claim, although it makes no reservation.

14. The section of the act of June, 1812, not only made an appropriation to which the faith of the nation was pledged, so that Congress cannot be supposed to have intended a breach of that faith, but from the moment of the passage of the act, the lands appropriated by the second section were held by the United States, in trust

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for the inhabitants of the several towns and villages, subject only to such reservations as the president might make for military purposes; and Congress could not, if it would, make any other disposition of the property.

15. The lieutenant-governor Delassus had no power, on the 21st Nov., 1803, to grant the land in controversy to any one, nor has any grant or concession, made after the treaty of cession, ever been recognized by law as any evidence of title or rightful claim. The land was the property of the United States, to be disposed of according to their laws. His order of the 21st November, 1803, and the proceedings of Soulard in 1804, were utterly void.

16. The verbal declaration made by the lieutenant-governor to Mr. Clamorgan in 1802, as recited in Mad. Lachaisse's petition, "that the demand should be made to him through Mr. Soulard," is no evidence of a grant, and the order made by Delassus 21st November, 1803, besides being without authority, is void for uncertainty: what land was granted in 1802 does not appear.

17. There appears to have been no grant, order of survey, or survey, by competent authority, in favor of Mad. Lachaisse. Her claim had not been confirmed by the commissioners, but had been rejected; she had not, nor had any person for her, inhabited, cultivated, or possessed any part of the lot in controversy; therefore, that lot was not rightfully owned or claimed by her on the 13th June, 1812; and, from that date, it was held by the United States, in trust for the inhabitants of St. Louis. It was not reserved by the president for military purposes, but has been, according to law, designated and set apart to the plaintiffs, for the use of schools. Neither the proceedings of the recorder, nor the act of April, 1816, has or can take away the right vested by the act of 1812, nor defeat the appropriation thereof as intended by that act.

The Court of Common Pleas neither admitted incompetent testimony, nor misdirected the jury, nor refused proper instructions; and the verdict being according to law and evidence, the judgment thereon ought to be affirmed.

E. BATES, in behalf of the appellee—The Board of Public Schools—submits the following propositions:—and,

First:—In the absence of any older adverse title in an individual, the title of the appellee to the lot in question is a good, legal, and valid title; and that title is evidenced in the acts of Congress, in the acts of our own General Assembly, and in testimony in this record, as follows:—

1. The act of Congress of June 13th, 1812, reserves the vacant lots therein mentioned for the use of schools in the town of St. Louis.—2 Story's Laws, p. 1257.

2. The act of 26th May, 1824, (supplementary to the above,) sec. 2, requires the surveyor, under the direction of the commissioner of the General Land-office, to survey, designate, and set apart said lots to the town, for the use of schools.—3 Story's Laws, p. 1972.

3. The act of Jan. 27, 1831, (a further supplement to the act of 1812,) relinquishes, to the town of St. Louis, all right, title, and interest to the lots

reserved for the support of schools, &c., and gives control of them to the Missouri legislature.—4 Story's Laws, p. 2220.

4. The act of the Mo. Assembly of 13th Feb., 1833, incorporates the board of president and directors of the St. Louis public schools, (the appellees,) and vests the school lands in the corporation.—See acts 1832, 3, pp. 37-9.

5. In pursuance of the acts of Congress (above cited) of 1812 and 1824, and under the direction of the commissioner of the General Land-office, the surveyor of the United States did survey, designate, and set apart the lot in controversy.—See the copy of the commissioner's letter of instructions, and the surveyor's act under it, with the accompanying diagram; see, also, the plat of the survey of the out-boundary of the town—all in evidence.

Under the first division of this cause, I say—

1st: That the act of the surveyor, designating and setting apart this lot for the use of schools, is, of itself, sufficient proof of the appellee's title; and none but the United States can be heard, to object to the want of irregularity and strict legal propriety of the proceeding. An adverse claimant, resting in possession only, cannot dispute the right.—See 6 Mo. Rep., 118, *Hunter vs. Hemphill*.

2d: The act of 1812 makes an appropriation, a dedication to public use, of the waste lots in, adjoining, and belonging to the town of St. Louis; and the acts of 1824 and 1831 are but parts of the same law; designed to perfect the original intent, and accomplish, in practice, the beneficial object of the first act.—2 Story, 1275; 3 *Ibid.*, 1972; 4 *Ibid.*, 2220; 10 Pet. Rep., 662, *New Orleans vs. United States*; Opinion of the Court, p. 710.

The persons interested in the school-lands under these acts of Congress, made constant claim and early attempts to apply the lands to the objects designed. The act of the territorial legislature of 30th Jan., 1817, (Geyer's Digest, 399,) established a board of trustees, with power, among other things, to lease, rent, and dispose of all such lands as had been, or might be, given by Congress for the support of schools in said town, and, in fact, that board acted long, and, as to some of the lands, efficiently, under the power.

3d: The land being thus appropriated and dedicated to public use, the Government could not, if it would, make any other disposition of it. This principle has often been considered of late years, and seems now to be settled.—See the following cases:—10 Pet. Rep., 662, *New Orleans vs. United States*; 12 Pet. Rep., 454, *Strother vs. Lucas*; *Chotard et al. vs. Pope et al.*, 6 Cond. Rep., 655; 12 Wheat., 586; *Cincinnati vs. White*, 6 Pet. Rep., 431; *Barclay et al. vs. Howell*, 6 Pet., 498; 1 Pet. Rep., 94, *Hickie et al. vs. Stuke*; 3 Mart. Rep., 296-303; 4 Mart. Rep., 625.

4th: Before the act of Congress of 1831, the Government was but a trust-holder of these lots, and could no more have conveyed them to a stranger, than any other trustee could destroy the right of his *cestui que trust*. But the act of 1831 relinquished the technical title, and the charter vested it in the plaintiffs.

5th: If it be objected, that this piece of ground is not a lot, I answer, that a lot may be of any shape or size. Every separate piece of land is a lot.

The word lot, as used in the first and second sections of the act of 1812, may well admit of different interpretations. The first section confirms lots to individuals, and such lands only as were inhabited, cultivated, or possessed, and therefore necessarily known in size, shape, and boundary; but the second section disposes of the residuum—the vacant lots not inhabited, nor designated, and therefore not known.—See 5 Mo. Rep., 241, *Lawless vs. Newman*; 6 Mo. Reports, *Newman vs. Lawless*.

6th: The lots disposed of were lots in, adjoining, and belonging to the town of St. Louis; meaning, not the Spanish town of 1803 and before, but the American town of 1812. The former had no survey, and no designated boundary; the latter was incorporated under a territorial law in 1809, and at the passage of the act of 1812 had known and established boundaries, as appears in this record.

For a description of what is a Spanish provincial town, see White's Compilation, in U. S. Land Laws, vol. ii., Appendix I., p. 36; and see the extracts of Spanish law, cited and approved by the court, in *New Orleans vs. United States*, 10 Pet. Rep., p. 724-6.

Second:—The adverse claim of Mad. Lachaisse, set up by the defendant, Hammond, in bar of the plaintiff's title, as the same appears in this record, is not any legal or valid title, as to this plaintiff, because—

1. The act of 1812 does not, of its own vigor, confirm the lot to Madame Lachaisse, for the plain reason that she never did inhabit, cultivate, or possess the lot prior to the 20th December, 1803, as appears in this record.

2. The recorder of land titles had no power to adjudge and confirm the claim under the act of 1812; nor could he, under that act, select the claim for confirmation.—See the act minutely, 2 Story's Laws, 1257; *Vasseur vs. Benton*, 1 Mo. Rep., 299, 300.

3. As far as the claim of Mad. Lachaisse depends upon a grant, and the confirmation thereof, the same is null and void; because,

1st: Governor Delassus, on the 21st Nov., 1803, after the treaty of cession, had no power to make the order of that date, to deliver possession to Madame Lachaisse, and the surveyor's act, under it, is utterly void. (6 Cond. Rep., 628, (12 Wheat., 530,) *Henderson vs. Poindexter's Lessee*.) The Spanish government could not make a valid grant in Florida while it had wrongful possession of the country.

2d: The order of possession does not purport to be a grant, and if it did, is void for uncertainty.

3d: Her lot has never yet been surveyed, hence a confirmation would be void for uncertainty.

4th: If confirmed at all, the confirmation must be under an act, after the accruing of the title.—See, again, the act of 1812, and the proceedings of the recorder for the confirmation of the lot to Mad. Lachaisse.

5th: The act of 1816, confirmatory of the report of the recorders of land titles, does not confirm this claim, because the claim is not sufficiently legal and specific

to be capable of confirmation; and because Congress had no power to confirm it to our prejudice.—Act 29th April, 1816, sec. 2; 3 Story's Laws, p. 1604.

Note.—The idea of granting the vacant grounds about the towns and villages, as done by the second section of the act of 1812, was first suggested by Thomas F. Reddick, clerk of the old board of commissioners, in a letter addressed to Mr. Morrow, chairman of the Committee of Public Lands in the House of Representatives, dated 26th March, 1812, at Washington, which contained a classification of claims, and suggests the giving of the remnant about the villages for the use of schools.—See Gale & Seaton's Public Documents, vol. ii., p. 450, 1.

SCOTT, Judge, delivered the opinion of the Court.

Congress, by the act of 13th June, 1812, confirmed to the inhabitants of the town of St. Louis severally, their rights, titles, claims to town lots, out-lots, common-field lots, and commons, in, adjoining, or belonging to the said town, which had been inhabited, cultivated, or possessed prior to the 20th of December, 1803. By the second section of the same act, all town lots, out-lots, or common-field lots included in the survey of the said town, directed to be made by the said act, which are not rightfully owned or claimed by any private individual, or held as commons belonging to said town, except such as may be reserved for military purposes, are reserved for the support of schools in said town.

Margarette Lachaisse claimed a lot in the town; the claim to this lot was presented to the first board of commissioners for confirmation, and was by them rejected. The recorder of land titles afterwards, under the provisions of the act above mentioned, reported the said lot for confirmation; and, by the act of Congress of the 29th April, 1816, the claim to the lot was confirmed.

By the act of 26th May, 1824, the individual owners, or claimants, of town lots belonging to St. Louis were, within eighteen months from the passage of the act, required to designate their lots, by proving, before the recorder of land titles, the fact of inhabitation, cultivation, or possession, and the boundaries and extent of each claim, so as to enable the surveyor-general to distinguish the private from the vacant lots appertaining to the said town. By the second section of the same act, it is directed, that immediately after the expiration of the said term allowed for proving such facts, it shall be the duty of the surveyor-general, under the instruction of the commissioner of the general land-office, to survey, designate, and set apart to the said town, so many of the vacant town-lots, out-lots, or common-field lots, for the support of schools in said town, as shall not have been reserved for military purposes.

By the act of January 27th, 1831, sec. 2, the United States relinquished all their right, title, and interest in and to the town lots, out-lots, and common-field lots reserved for the support of schools in the said town, by the second section of the act of June, 1812, above referred to, and directed that the same shall be sold, or disposed of, or regulated, for the said purposes, in such manner as may be prescribed by the legislature of the State of Missouri.

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The general assembly of this State, by the act of 13th February, 1833, incorporated the inhabitants of St. Louis by the name and style of "Board of the President and Directors of the St. Louis Public Schools;" and by the ninth section of the same act, authorizes the said board to take possession, charge, and control of the lots granted by the United States for school purposes; and as far as the general assembly could control the title to the said lots, it was vested in the said corporation.

Under instructions from the commissioner of the General Land-office, dated 15th January, 1839, the surveyor-general did survey, designate, and set apart to the said board, the lot in the declaration mentioned.

The plaintiff, in this action, is the corporate body above mentioned, created by the general assembly of this State.

The defendant claimed under the representatives of J. Mullanphy, deceased, who claimed under Margaret Lachaisse, above named. Judgment was rendered against the defendant.

It was contended for the plaintiff, that there had been no grant, order of survey, or survey, by competent authority, in favor of Madame Lachaisse; her claim had not been confirmed by the commissioners, but had been rejected; she had not, nor had any person for her, inhabited, cultivated, or possessed any part of the lot in controversy; therefore, that lot was not rightfully owned or claimed by her on the 13th of June, 1812; and from that date it was held by the United States, in trust for the inhabitants of St. Louis. It was not reserved by the president of the United States for military purposes, but has been, according to law, designated and set apart to the plaintiffs, for the use of schools. Neither the proceedings of the recorder, nor the act of Congress of April, 1816, has or can take away the rights vested by the act of 1812, nor defeat the appropriation thereof as intended by that act.

This is an action of ejectment, and in order to determine the cause, it will be necessary to ascertain in whom the legal title rests.

It is a point conceded on all hands, that the first section of the act of 13th June, 1812, gave to the inhabitants of St. Louis, who had inhabited, cultivated, or possessed a lot prior to the 20th of December, 1803, a legal title, by which they could defend themselves against all claimants. (*Vasseur vs. Benton*, 1 Mo. Rep.; *Strother vs. Lucas*, 10 Peters.) Does the second section of that act vest as absolutely the vacant lots in the inhabitants, in their corporate capacity, as the first section does the title to the inhabitants individually?

The second section enacts, that all lots not rightfully owned or claimed by any private individual, or held as commons belonging to the town of St. Louis, or that the president may not think proper to reserve for military purposes, shall be, and the same are hereby, reserved for the support of schools in said town. These words do not convey title, but merely express the intention of Congress with regard to the vacant lots; it is a declaration of intention, which good faith required should be carried into effect. The donation was not complete; something further was contemplated before the title passed from the United States.

The words of the second section do not pass title to the inhabitants, they merely

reserve the vacant lots for the use of the schools in the said town. If the general government had held the lots thus reserved, and had become the trustee, and employed itself in that capacity, in the management of them for the use of the inhabitants, its undertaking would have been complied with; it would have discharged the obligation it incurred by the enactment of the second section of the act of 1812. If one conveys a lot to A., and declares, in the act of conveyance, that he reserves another lot for the use of B., would this declaration divest the grantor of the legal title to the lot declared to be reserved? and could B., on this declaration, maintain an action of ejectment against him?

The act of March 3d, 1811, authorizing the president to offer for sale the public lands in this State, reserved section numbered sixteen, in very much the same language as is employed in the second section of the act of 1812; the words being—"Shall be reserved in each township, for the support of schools within the same." Yet these words of reservation were not construed by Congress so to divest the legal title to those sections, as to prevent its passing by a subsequent act, as we find by the act of 3d March, 1819, Congress expressly granting away the sixteenth sections to claimants of pre-emptions, under the fifth section of the act of 12th April, 1814, entitled, "An act for the final adjustment of land titles in the State of Louisiana and territory of Missouri." In the 5th volume American State Papers, "Public Lands," we find a report from the committee of private land claims, made on the 22d December, 1828, by the representative in Congress from this State, a gentleman by no means unknown, and whose opinions, on any subject, are entitled to respect, urging the passage of a law of Congress, vesting in the board of trustees, for the regulation of schools in the town of St. Louis, incorporated by an act of the general assembly of the territory of Missouri, of the 30th January, 1817, the absolute title of all the lots reserved by the act of Congress of the 13th June, 1812, for the support of schools in the town of St. Louis. This report, it appears, was induced by a memorial of the said board, in which they declare their inability to effect the purposes for which they were incorporated, "*because the titles to the lots still remained in the United States.*"

This opinion of the board was concurred in by the committee of private land claims, who made the report, which was accompanied by a bill, which we may suppose was afterwards matured into the act of 27th January, 1831, above-cited, and which granted the prayer of the memorialists.

So, the question is, in whom was the fee in April, 1806? in the United States: it passed, by the act of confirmation, to Mad. Lachaise, and she, or those who claim under her, must prevail in this action, for the legal title alone is regarded in ejectment. It was said, we are not to construe acts of the legislature so as to make the United States guilty of a breach of faith; but there is here no room for construction. The first great rule of interpretation is, that we are not permitted to interpret that which has no need of interpretation. The language of the act of confirmation is plain; the lot in controversy was confirmed without any doubt, ambiguity or uncertainty.

It would be a source of regret, could any thing that has been said be made to bear the construction, that Congress, in confirming the claim of Madame Lachaise,

was guilty of a breach of faith to the inhabitants of St. Louis. Such an opinion is not entertained. Even had the recorder of land titles erroneously reported for confirmation the lot in dispute, it would not follow, that the United States was guilty of a breach of faith in confirming it. In order to ascertain the sense of Congress on this subject, we must take in consideration, in connexion with the second section of the act of 13th June, 1812, as well the subsequent sections of said act, as the before-cited acts of 1824 and 1831. From these it appears, that the United States reserved the right of ascertaining what lots were rightfully claimed by individuals.

Judge Baldwin, in delivering the opinion of the Supreme Court of the United States, in the case of *Strother vs. Lucas*, 10 Peters, 455, observes, "that, by the second section of the act of June, 1813, all town, out, and common-field lots included in the survey therein directed, not rightfully owned or claimed by any individual, or held as commons belonging to the towns or villages, or reserved by the president for military purposes, were reserved to the towns and villages for the support of schools. In order to ascertain what lots were owned or claimed by individuals, the recorder was, by the eighth section, empowered to act on claims filed before the 1st December, 1813, as has been seen, and those before filed and undecided.

From this language of the Supreme Court, it would seem, that in the act by which the reservation was made, under which the plaintiff claims, the United States retained the power of prescribing a mode of determining who rightfully claimed a lot. Congress acted on the principle, *cujus est dare, ejus est disponere*. If they could grant, they could prescribe terms to the grant. The act of 1824 clearly shows the opinion Congress entertained on the subject of this reservation. By that act private lot holders were required, within a limited time, to make proof of their inhabitation, cultivation, or possession, prior to the 20th December, 1803, so that the vacant, or school lots, might be designated and set apart. This act is not repugnant to, nor inconsistent with the act of 1812, for, according to the opinion of the Supreme Court, the inhabitants took the lots subject to the power here exercised. We have seen the legal title to the school lots was in the United States until the year 1831. Some legislation was necessary to prescribe a mode by which those lots could be separated and distinguished from those which belonged to individuals. If the United States have prescribed a mode of determining the private from the unappropriated lots, and the officer appointed to discharge this duty has reported a lot for confirmation, and the United States have thereupon passed the legal title to the claimant, with what propriety can it be said the public faith is violated? A possibility of committing errors was incident to the right reserved for ascertaining the school lots, and if they were taken with this burden, the plaintiff cannot now justly complain that an error has been committed to its prejudice.

TOMPKINS, Judge.—This is an action of ejectment, commenced by the Board of the President and Directors of the St. Louis Public Schools against John Hammond, and judgment being given against him, he appealed to this Court. The matter in

dispute is a lot in the present city of St. Louis, claimed by each party, under the act of Congress of 13th of June, 1812.

On the trial of the cause, the plaintiff gave in evidence a transcript of the record of the Court of Common Pleas of St. Louis county, in the territory, now State, of Missouri; by which it appears, that in the month of November, in the year 1809, the town, now city, of St. Louis was incorporated, with certain limits therein set out. The charter of the city of St. Louis, by a legislative act of 1833, was also given in evidence.

The plaintiff then gave in evidence, a plot and survey of the land described in the declaration, purporting to be a designation and setting apart of the same for the use of schools; this paper is in these words, viz.:—

“Office of the Surveyor of Public Lands in the States of Illinois and Missouri, 28th February, 1840.

“Under the instructions of the commissioner of the general land-office, the piece of land which is herein plotted and described has been legally surveyed; and under the instructions aforesaid, it is hereby designated and set apart to the town, now the city, of St. Louis for the support of schools, in conformity with the second section of the act of Congress, approved the 26th of May, 1824, entitled, ‘An act supplementary to an act passed the 13th of June, 1812, entitled, An act making further provisions for settling the claims to land in the territory of Missouri.’ The said piece of land, hereby designated and set apart, as aforesaid, is situated within the bounds of the survey so as to include the town lots, out-lots, common-field lots, and commons, of the town of St. Louis, as it stood incorporated on the 13th day of June, 1812, and does not, together with all the other land designated and set apart to the town of St. Louis for the support of schools, under the aforesaid second section of the act of Congress of the 26th May, 1824, amount to one-twentieth part of the whole lands inclosed in the general survey directed to be made of the said town of St. Louis, by the aforesaid first section of the act of 13th June, 1812, nor was it held as commons belonging to said town of St. Louis, nor has it been reserved by the president of the United States for military purposes.”

The plaintiff also gave in evidence, a letter of the commissioner of the general land-office to the surveyor of Illinois and Missouri, directing him to set apart certain lands, for the support of schools, under the said acts of Congress, in which lands, so set apart, the land in controversy is included. To the admission of all this evidence the defendant objected, and excepted to the opinion of the Court overruling that objection.

The plaintiff here closed his evidence.

The defendant then gave in evidence, documentary testimony, as follows, viz.: 1st: Notice to the recorder of the claim of Mad. Lachaisse, which he sets up as a defence against the claim of the plaintiff. 2d: Selection of this lot by Frederick Bates, recorder of land titles, for confirmation. 3d: The opinion of said recorder, that the claim of Mad. Lachaisse ought to be confirmed.

An abstract from the books of the recorder was given in evidence, of which the following is the substance, viz.:—That the warrant, or order of survey, was

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made by Delassus, the lieutenant-governor: No survey made, the surveyor returning, that he made none, because he did not know whether a street ought to be traced out in that part of the town, and, if so, in whose land the street ought to be traced; and therefore, he had put the lady, widow Lachaisse, in possession of the land lying between the claims of Clamorgan on the north, and Lecompte on the south: the location is described as a lot in the town of St. Louis, of which the applicant had possession prior to 1803. The recorder's opinion was, that the claim ought to be confirmed. Other evidence, both documentary and oral, was given, of which I shall not now take any notice.

The plaintiff then asked these instructions:

1. If the jury find, from the evidence, that neither Margarett Lachaisse, nor any other person for her, did inhabit, cultivate, or possess the lot of ground in controversy, or some part thereof, prior to the 20th of December, 1803, the claim of the said Margarett Lachaisse, as the same is in evidence, cannot avail the defendant as a bar to this suit.

2. The acts, decisions, and reports of the recorder of land titles are not, nor is either of them, evidence, in this action, that the lot, or parcel of ground, included in the survey No. 3,197, or any part thereof, was inhabited, cultivated, or possessed by Margarett Lachaisse, or any person for her, prior to the 20th December, 1803.

The defendant opposed the giving of these instructions, and the court overruling his objections, the defendant excepted to the opinion of the court.

The defendant then prayed several instructions.

1. If the jury believe, from the evidence, that the piece of ground sued for in this action is embraced in the confirmation of the recorder of land titles to Margarett Lachaisse, given in evidence by the defendant, they are bound to find for the defendant.

The second and third instructions amount to the same thing, expressed in other words. It is, in the second instruction, further remarked, that these confirmations of the recorder were made under the act of 13th June, 1812; consequently, though they are, in common parlance, called confirmations, yet they are only recommendations of lots to Congress for confirmation.

The fourth instruction prayed by the defendant is, that, "if the jury believe that no portion of the piece of ground in question was either a town lot or village lot, out-lot, or common-field lot, before the transfer of Louisiana to the United States, then they are bound to find for the defendant."

These instructions the court refused to give, and the defendant, by his counsel, excepted to the opinion of the court.

The jury being thus instructed, found a verdict against the defendant, and he moved the court for a new trial. The court overruled the motion, and the defendant appealed to this Court.

As part of the evidence of the case, it will be here observed, that the act of 29th April, 1816, confirms this claim of Margarett Lachaisse, amongst many others recommended, for that purpose, by the late recorder, Bates. "Then," to use the language of Mr. Justice Baldwin, in *Strother vs. Lucas*, 12 Peters, p. 455,

"comes the act of 1831, the first section of which enacted, that the United States do relinquish to the inhabitants of St. Louis, &c., all their right, title, and interest to the town or village lots, out-lots, common-field lots, and commons, in, adjoining, or belonging to the towns and villages confirmed to them respectively by the act of 1812; to be held by the inhabitants in full property, according to their several rights therein; to be regulated or disposed of for the use of the inhabitants, according to the laws of Missouri."

By the second section of that act, the United States relinquished their right, title, and interest in and to the town and village lots, out-lots, and common-field lots in the State of Missouri, reserved for the support of schools in the respective towns and villages aforesaid, by the second section of the act of Congress of 13th June, 1812, and declared that the same shall be disposed of, or regulated, for the said purposes, in such manner as may be directed by the legislature of said State.

The act of Congress of 13th June, 1812, under which both plaintiffs and defendant claim, is, so far as is material to the present purpose, in these words:—"Section 1st: The rights, titles, and claims to town or village lots, out-lots, common-field lots, and commons, in, adjoining, and belonging to the several towns or villages of St. Louis, &c., in the territory of Missouri, which lots have been inhabited, cultivated, or possessed prior to the 20th day of December, 1803, shall be, and the same are, hereby confirmed to the respective towns or villages aforesaid, &c."

"2d: All town or village lots, out-lots, or common-field lots included in such surveys, which are not rightfully owned or claimed by any private individuals, or held as commons belonging to such towns or villages, or that the president of the United States may not think proper to reserve for military purposes, shall be, and the same are hereby, reserved for the support of schools in the respective towns or villages aforesaid; provided, that the whole quantity contained in the lots reserved for the support of schools in any one town or village shall not exceed one-twentieth part of the whole lands included in the general survey of such town or village.

On the part of the plaintiff below, appellee here, it is contended, that the act of the 13th of June, 1812, "contemplated no further action by the recorder in relation to lots; that whatever lots Congress intended to confirm are confirmed by the first section; and that all not confirmed by that section are reserved, by the second section, for the support of schools." *Vasseur vs. Benton*, 1 Mo. Decisions, p. 300, and *Strother vs. Lucas*, 12 Peters, 454, are relied on as authorities. And it is contended, that if no portion of the piece of ground in controversy was a lot before the 20th of December, 1803, it would follow, that *Mad. Lachaise* could have no title to it under the act of 13th June, 1812.—*Newman vs. Lawless*, 6 Mo. Dec., p. 279.

The merits of the case, then, depend on these two points:—1st, What was the duty of the recorder under the act of 13th June, 1812? and, 2d: What is a town or village lot, out-lot, or common-field lot, in the sense in which those words are used in this last-cited act of Congress, viz., the act of 13th June, 1812?

1. In *Vasseur vs. Benton*, this Court said: "According to the construction we give to this act, we are of opinion, that the claims to town and village lots which had been inhabited prior to the 20th December, 1803, are, by the express words thereof, "hereby confirmed," *ipse facto* confirmed, as to the rights of the United States, and which became thereby vested, either in individuals, or reserved for the use of schools therein; that, therefore, the recorder of land titles, (whose power extended no further than to give and report to Congress his opinions on claims to land, in which the United States were only interested,) had no authority to enter into an investigation of, or decide on, the titles of individuals to those town lots, and that any conflicting claims between them to any of those lots ought to be decided in a due course of law, according to their priority of possession, cultivation, or inhabitation.

"A contrary construction would be predicated on the presumption, that Congress had the power, or, at least, that they meant, which we are far from believing, to institute a tribunal to judge of the private rights or claims of individuals; and it would, in effect, be saying, that he had the right of judging of those claims, not only between private individuals, but also between them and the inhabitants at large of the respective towns, &c., to whom, for the use of schools, all lots, &c., not rightfully claimed, had been reserved and given.

"All legislative acts are to be so construed as to endeavor, if possible, to give full effect to every part of them.

"Taking this rule for our guide, we clearly infer, that Congress, by making use of the words, 'shall be, and the same are hereby, confirmed,' intended a full confirmation of the town and village-lots, or they would not, in the third and other sections of the same act, directing the confirmation by the recorder, in certain cases of donation, and other claims to land, have made use of the words, 'shall be confirmed,' in the future tense.

"Hence we conclude, that as far as relates to donation and other claims to land, the recorder was vested with discretionary, but limited, power to judge and give his opinion on the merits of the different claims, as between the United States and individuals, but that he had no such authority as to the town and village lots, they having, by the former part of the act, been confirmed."

I come now to the second authority relied on by the appellees, *viz.*, *Strother vs. Lucas*, 12 Peters, 454.

In order to understand the passage in the opinion of the court here referred to, it becomes necessary to remark, that *Strother* commenced this suit against *Lucas* for two of the common-field lots of St. Louis, more commonly called 'forty arpent lots,' (because they are forty arpents deep from east to west, by one arpent in width,) and that these lots had been confirmed to *Chouteau* by that board of commissioners, to all of whose powers and duties the recorder had, by the eighth section of the above-recited act of 13th June, 1812, succeeded; save only, that he did not confirm, but only gave his opinions in favor of such claims as he thought ought to be confirmed. It will also, for the purpose of well understanding this authority, be necessary to go a little further back than we are referred by *Mr. Geyer*, *viz.*, to p. 453 of 12 Peters.

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The court there says: "The plaintiff gave in evidence two opinions of land titles of St. Louis county, confirming to the representatives of Gamarche and Kiercereau the forty arpent lots of each, and directed each to be surveyed, but did not offer the confirmations to Chouteau by the board of commissioners, which were given in evidence by the defendant."

The plaintiff claims under the former; the defendant under the latter. That of the plaintiff will be first considered.

By the eighth section of the act of 13th June, 1812, the recorder of land titles was invested with the same powers, and enjoined to perform the same duties as the board of commissioners, (which was then dissolved,) in relation to claims which might have been filed before the 1st of December, 1812, and the claims which have been heretofore filed, but not acted on by the commissioners; except that all his decisions shall be subject to the revision of Congress.

He was directed to report to the commissioner of the General Land-office, a list of all such claims, with the substance of the evidence in support thereof, his opinion, and such remarks as he may think proper, to be laid before Congress at their next session. By the act of 1813, the time of filing claims was extended to the 1st January, 1814, under which act the recorder made the confirmations relied on by the plaintiff, on the 1st of November, 1815, which was confirmed by the second section of the act of 1816. But these confirmations cannot avail the plaintiff as a claimant under these or any other acts of Congress, for the following reasons: 1st, that the authority of the recorder of land titles was, by the express terms of the acts of 1812 and 1813, confined to those claims on which the board of commissioners had not previously acted; from which it follows, that after the board of commissioners had made a confirmation of a specific claim, the action of the recorder is either merely cumulative, and so inoperative, or if adverse, merely void, as an assumption of power in a case in which he had not jurisdiction, and his action must be a mere nullity."

These last words, "and his actions a mere nullity," are, it seems, what Mr. Geyer relies on, and if they be detached from the foregoing and following passages, they certainly are conclusive for him. But let us pursue the case in Mr. Justice B.'s own words:

"Here the commissioners had decided on the identical claims in 1809, '10: Congress had made a general confirmation of all the claims of the then inhabitants of the town of St. Louis, of their title to the common-field lots in 1812, when the defendant was an inhabitant thereof, and in actual possession of those in controversy; and by the act it was provided, that it should not affect any confirmed claims to the same lands. Surveys were directed to be made; plots to be made out, and transmitted to the General Land-office and recorder of land titles. As the act directed no further steps to be taken, the title became complete, and the recorder thenceforth ceased to have any power over the confirmed lots, save to perform the ministerial offices directed by law, as the ordinary duties of his office."

It is most obvious, that Mr. Justice Baldwin has been all along speaking of the action of the recorder on the lots confirmed by the board of commissioners. He calls the recorder's action on those lots, "An assumption and usurpation of

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power in a case in which he had not jurisdiction;" and declares, that his action, "when adverse," must be a mere nullity.

Accordingly, in the next page, viz., p. 455, he says: "By the second section, (of this act of 13th of June, 1812,) all town, out, and common-field lots, included in the surveys therein directed, not rightfully owned or claimed by any individual, or held in common, belonging to the towns or villages, or reserved by the president for military purposes, were reserved to the towns or villages for the support of schools. In order to ascertain what lots were owned or claimed by individuals, the recorder was, by the eighth section, empowered to act on claims filed before the 1st of December, 1813, as has been seen, and on those before filed and undecided. The time for presenting such claims was further enlarged by the act of April 1st, 1814."

From both of these extracts of the opinion of the Supreme Court of the United States, as delivered by Judge Baldwin, it seems that the court did not believe, as the Supreme Court of this State decided in the case of *Vasseur vs. Benton*, that the powers of the recorder extended no further than to give and report to Congress his opinions on the claims to land in which the United States were only interested.

I suppose the judge who wrote that opinion intended to qualify the word "which" by the word "only." If that were his intention, the words should have been arranged thus: "on claims to land in which only the United States were interested."

If such be the meaning intended to be expressed in that sentence, (and I can perceive no other that can be consistently given,) the judge and the court could not have recollected, that, by an express provision in the second section of the act of 13th June, 1812, under which act *Vasseur* claimed, and under which the appellees in this cause claim, the president of the United States might reserve, for military purposes, such lots as were not rightfully owned and claimed by any private individuals, &c. If we even admit, that the Congress of the United States was willing to leave the private individuals to be harassed in the courts of the territory, or future State, by the Corporation of St. Louis; it cannot reasonably be supposed that they could intend that the president of the United States should be compelled to go into the courts of law to ascertain what lots he might, under that act, reserve for military purposes.

It is very true, that Congress has the right and power to subject their agent to this inconvenience, and also to lay the inhabitants of St. Louis at the feet of this corporation, if they had chosen so to do. But they have not expressly said so; and it is by inference only that the Supreme Court of this State have come to their construction of the act of Congress.

For, says the judge, 1st vol. Mo. Decisions, p. 300, when the act speaks of town lots, the language is, that the claims to town lots which have been inhabited, cultivated, or possessed, prior to the 20th December, are, by the express words thereof, "hereby confirmed," *ipso facto* confirmed, and that conflicting claims between the inhabitants to any of those lots ought to be decided in a due course of law, &c.

Again, on the same page, he says, "We clearly infer, that Congress, by making

use of the words, 'shall be, and the same are hereby, confirmed,' intended a full confirmation of the town and village lots, or they would not, in the third and other sections of the same act, directing the confirmation by the recorder in certain cases of donation, and other claims to land, have made use of the words, 'shall be confirmed,' in the future tense."

Verbal criticism has its use even in the construction of statutes. It seems to me, however, that the difference in the terms used in the several sections of the act above pointed out may be very easily accounted for, without giving to that act the inconvenient construction contended for by the appellee, on the authority of the case of *Vasseur vs. Benton*.

When, in the first section of the act of the 13th June, 1812, it is said, that the rights, titles, and claims to town or village lots, &c., which lots have been inhabited, cultivated, or possessed, prior to the 20th December, 1803, "shall be, and the same are hereby, confirmed" to the inhabitants, &c., the act unconditionally and absolutely separates this property from the public domain which is afterwards to be brought into market and sold, for the use of the treasury of the United States; and the second section of the same act disposes of such part thereof as should not rightfully belong to any of the inhabitants, or other persons.

But the third section declares, that certain claims to a donation of lands therein specified "shall be confirmed," on condition, and the condition is this, viz.: "In case it shall appear that the tract so claimed was inhabited or cultivated by the claimant, or some one for his use, prior to the 20th December, 1803," &c.

Again, the seventh section provides, that those persons who had not then filed their claims, might do so till the first day of December then next.

If these persons failed to file their claims, the claims, consequently, could not be confirmed; the land, of necessity, must fall undistinguished into the general mass, and with that mass be sold by the United States, whereas the town or village lot, &c., was a thing that, in legal contemplation, had an existence, and was capable of being separated from the general mass of the public lands. In this manner, it seems to me, one may very readily and properly account for the difference between the language used by Congress in the first section, where town lots are spoken of, and that used when claims to a donation of lands are spoken of in the third section, without throwing the claims of the parties into the courts of the country, whether territory or State, to be decided by a due course of law, according to the opinion of the Supreme Court in the case of *Vasseur vs. Benton*, above cited. It may be remarked, that the act of 2d March, 1805, made no special provision to settle the claims of the inhabitants to town or village lots. It provided for the settlement of claims to land only, and the claimants were, by that act, required to file their claims within a given time with the recorder.

Yet many persons filed their claims for town lots, and those claims were acted on, and many of them confirmed by the board of commissioners to settle land claims, as abundantly appears in the State Papers, "Public Lands."

The seventh section, then, of the act of the 13th June, 1812, requiring persons claiming land in the territory of Missouri, and whose claims have not already

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been filed, to file their claims within the time therein specified, may, with good reason, be construed to refer to the claimants of town or village lots, &c.

My confidence in the superior abilities and great experience of the judges composing the court when the case of *Vasseur vs. Benton* was decided, long determined me to acquiesce in that decision; and the first time the case of *Newman vs. Lawless* came up, (see 5th vol. Mo. Decisions, p. 338,) I delivered the opinion of the court, recognizing the authority of *Vasseur vs. Benton*. When that case came up the second time, the president of the court was absent, and the appellee being urgent, I very unwillingly agreed to take up the case; but the appellee expressing his determination to take an appeal to the Supreme Court of the United States, in case he were unsuccessful, I the more readily reconciled it to myself to construe the act of Congress as to me seemed best, without considering myself bound by the authority of *Vasseur vs. Benton*. I will here remark, that the case of *Newman vs. Lawless* was argued at the Fall term of 1839, and kept under advisement till the May term, when the judgment was given, and the opinion delivered.

Then came on the case of *Gurns vs. Administrators of Jarvis*, in which the president, being then present, delivered the opinion, and from that I dissented. (See 6th vol. Mo. Decisions, p. 332, May term, 1840.) With so many expressions of the court against me, I should be inclined to surrender my judgment to its authority, were it not that the decision is on a statute of the United States, and the opinion of the Supreme Court of the United States, so far as it is expressed in *Strother vs. Lucas*, seems to me to be favorable to my view of the act of 1812. The recorder, then, I believe, for the reasons above given, had jurisdiction in the case. The recorder has acted on the claim of *Margarette Lachaisse*, and recommended it for confirmation, and Congress have confirmed it.

In *Hoofnagle vs. Anderson*, (7 Wheaton, 215,) it was decided, Chief Justice Marshall delivering the opinion of the court, that, "If a patent has been issued irregularly, the Government may provide means for repealing it, but no individual has a right to annul it, to consider the land as still vacant, and to appropriate it to himself."

If, then, I am right in my conclusions, as above stated, it is quite immaterial, so far as the appellee is concerned, whether *Margarette Lachaisse*, or any person for her, did inhabit, cultivate, or possess the lot of ground in controversy, or any part thereof, prior to the 20th day of December, 1803, her claim being recommended by the recorder, in the due and proper discharge of his duties, under the act of 13th June, 1812, for confirmation, and Congress having confirmed it by law, and a confirmation by law being equivalent to a patent.

In my opinion, then, both of the instructions asked by the plaintiff in the Court of Common Pleas were improperly given.

2. What is a town or village lot, out-lot or common-field lot, in the sense in which these words are used in the act of 13th June, 1812? On the part of the appellee, it is said, that any parcel of ground having definite limits, whatever its figure may be, is a lot.

This, in the abstract, is true. If a farmer enclose a piece or parcel of ground, it

is his lot. It may be his grass lot, his horse lot, &c.; and whatever may be its superficies or figure, it is still his lot.

But when words, as often happens in popular language, are susceptible of several meanings, they must be construed according to the subject-matter. Thus, the Supreme Court of Pennsylvania, in the case of *Duncan vs. Walker*, (2 Dallas, 205,) say that the words, "legal representatives must," in legal contemplation, be the heirs, not the administrators, because the subject-matter, in that case, was land, or real estate; and in the case of *Mullanphy's Heirs vs. Simpson*, the late Judge McGirk, delivering the opinion of the court, and referring to the above-mentioned case, of *Duncan vs. Walker*, and admitting its authority, says, that the legal representatives of the deceased must, in legal contemplation, be the executor or administrator, because the subject-matter in the case was personal property or the payment of debts. (See 4th vol. Mo. Decisions, p. 319.) The same principle is recognized in *Wear and Hickman vs. Bryant*, 5th Mo. Rep., p. 164.

In towns or villages, the lots are made by the intersection of streets, generally at right angles. The common-field lots, or, as they are now more commonly called, the forty arpent lots, so called, because they are forty arpents long by one in width, have, at St. Louis, their east end bounded by one general line running nearly north and south. They were laid out with a view to the convenience of the inhabitants, for cultivation. Every court of this State is bound to take notice, that after the transfer of this country to the United States, there was no authority here to lay out the public lands into lots around St. Louis. An out-lot, then, if there be any such thing different from one of these common-field lots, must have had its existence under the Spanish or French governments, and, by the language of the first section of the act of 13th June, 1812, each lot so granted must be in, adjoining, or belonging to St. Louis; and it must have been, like the common-field lot, a constituent part of the town, and not any vacant place or parcel of ground left unappropriated, either accidentally or designedly. To prove that the recorder had no authority to act on the claim of Madame Lachaise, Mr. Bates, counsel for the plaintiff, appellee, read a letter from the late Thomas F. Riddick, clerk of the above-mentioned board of commissioners, addressed to Mr. Morrow, chairman of the committee on public lands, dated 26th of March, 1812; and Mr. Spalding, counsel for the appellant, to prove the contrary, read a letter from the late Clement B. Penrose, addressed to Mr. Gallatin, then secretary of the treasury. Mr. Penrose was one of the commissioners, and he and Mr. Riddick had borne the report of the board from St. Louis to Washington city: his letter was dated the 20th March, 1812. If there is any thing in either of those letters written before the passage of the law, to indicate an opinion of either of those persons on the law of the recorder's duty, it is too deep for my vision to discover it, and it is very easy to show, by the records of this Court, if it were material, that Mr. Riddick's opinion was different.—See the case of *Newman vs. Lawless*, above cited, in which it appears, that Lawless derived title from Riddick, and that Riddick had purchased the property in dispute from the widow of Marly, according to the appellee's construction of this act of 13th June, 1812. These two letters show, I think, very plainly, how the word "out-lot" came into the

act of 13th June, 1812; for each of these letters was communicated to the House of Representatives, and it is quite a reasonable presumption, that the act of 1812 was passed in consequence of their representations.

Mr. Penrose's letter is as follows:—"Claims for out-lots, or *field lots*, as they are termed, should be confirmed, recorded, or not recorded, if those do not interfere with the claims confirmed: all those tracts have been cultivated from fifteen to fifty years. There may be a few *vacancies*, perhaps, in those fields; grant them, in such case, to the inhabitants, for public schools."

Evidently, he uses the word out lot, and field lot, (meaning, no doubt, the common-field lot,) as words of the same import.

He says, too, that those lots have been cultivated and possessed from fifteen to fifty years. If any out-lots, other than the common-field lots, had been cultivated and possessed from fifteen to fifty years, the appellee could and would have proved it, had it been his interest to do so. But Mr. Penrose says, "There may be vacancies," and recommends what shall be done with them: yet, in the law, nothing is said about giving these vacancies for public schools, and the plaintiff supplies that deficiency in the law, by calling these vacancies, "*out-lots*."

Mr. Riddick, in his letter, says:—"The forty-ninth class will comprise nearly one-fourth in number of all the claims in the territory, and if confirmed at once by the outlines of a survey to be made by the principal deputy, would give general satisfaction, and save the United States a deal of useless investigation into subjects that are merely matters of individual dispute. The United States can claim no right over the same, except a few solitary village lots, and inconsiderable *vacant spots*, which might be given to the inhabitants for the support of schools."

It is not to be presumed, that men of the high standing and respectability of those letter-writers would rudely obtrude their views on the secretary of the treasury, and the chairman of the committee on public lands; but we must suppose that those high officers, anxious to obtain information from so good a source, solicited their opinions to be given in writing; and, according to Mr. Riddick's opinion, we find the survey directed to be made by the principal deputy. Mr. Penrose's description of the lots is adopted literally in the second section, viz.: "out-lots, or common-field lots;" both terms used as imputing the same meaning; and this is the section under which the appellee claims. It seems to me, that, without any further evidence of the intention of Congress, this section alone ought to be sufficient to restrict the appellee to town or village lots, and common-field lots. But when we reflect on the usual cautious policy of Congress in the disposition of the public lands, and when we consider, moreover, that its attention had been particularly called, by the respective letters of Mr. Penrose and Mr. Riddick, to the existence of this property in and about St. Louis, by the name and description of village lots, out, or field lots; and that the attention of Congress was further called to other property, answering to the description (as these letter-writers thought) neither of village lots, out-lots, nor field lots, which other property Mr. Penrose calls "vacancies," and Mr. Riddick calls "vacant spots;" there is no room left to believe that Congress did intend to

convey any thing by the act of 1812, except what these letter-writers had recommended to be given, under the name of village lots, out, or field lots, and what, consequently, must have actually surveyed and marked out as such lot by the public authorities, before the territory was transferred to the United States.

I, myself, cannot but think, that this is the first time that a piece or parcel of ground left vacant, about a town or village, has ever been called a lot by educated men; and, as the evidence of Mr. Riddick has been introduced here by one of the appellee's counsel, to prove the law of his case, I feel myself at liberty to say, that Mr. Riddick, though no lawyer, (for I knew him as well as the counsel, and much earlier,) understood the English language as well as most of us who pretend to know something of it; and that Mr. Penrose was not only a well-educated man, but spoke the French language well and fluently, and therefore had the best opportunities to acquire information of this kind, among a people who at that time spoke the French language almost exclusively, and but few of whom could understand the English when he first came to the territory, or even in the year 1812.

Both of these persons, then, being well acquainted with the meaning of the language which they used, and also well acquainted with the subject-matter about which they wrote, appear to have expressed themselves deliberately, like men who knew that legislation would take place on the subject-matter of their letters, and that such legislation would probably be influenced by their opinions. There is, then, every reason to believe that they studied accuracy in the terms they used. And Congress, in the grants it made by the act of 1812, seems to have guardedly used, in the law, the same terms used by the letter-writers.

The grant of lots was made according to the recommendation of Mr. Penrose, and the survey of the town directed in the language of Mr. Riddick. But no disposition was made of what Mr. Penrose calls "vacancies," and Mr. Riddick calls "vacant spots."

I was desirous to add the testimony of the late Judge Leduc on this head, as it is a part of the history of the country; but the clerk has not been able to find the record in the case of *Newman vs. Lawless*. It was contained, I think, in the bill of exceptions in that case, and was a part of the testimony, which it was not thought material to set out in the case as reported.

From all I have been able to collect of the practice of the Spanish authorities at St. Louis, as well as from the testimony in this cause, as in others that have been in this court, they never, for many years, did lay out lots, but on the application of persons who demanded them, either for cultivation or residence. If that be the case, it necessarily follows, that there would be no vacant lot about or in St. Louis, unless it were abandoned by the person for whom it had been laid out, or his assignee, as in the case of Chancellor's widow, who, after the death of her husband, removed to St. Charles. (*Strother vs. Lucas*, 12 Peters.) The power of granting land confided by France to the governor of the province, was, after the transfer, continued by Spain in the same officer, till the year 1798, when it was given to the intendant-general. (See 2d vol. Land Laws, 530-554.) The lieutenant-governor at St. Louis, and other officers in their respective districts, had

authority to grant permissions, under certain regulations, to persons to reside on the lands of the Crown, till they got a title from the governor, first, and after the year 1798, from the intendant; and until the patent emanated from the governor or intendant, the land was not severed from the domain. That government which had provided by express law that there should be no title without the patent of the governor or intendant, would not suffer the villagers of the wilds of Louisiana to gain a title from itself, by law of prescription of their own making. Thence the right of the United States succeeding to the rights of the Spanish crown, to require these people to prove their incomplete claims within a given time, the corporation should have attended the recorder's court, and have produced testimony to prove unjust claims. The act of 1812 gave them the property without any dependence on the legislature of Missouri. But Margarett Lachaisse has now obtained a title to her property, which none but the government of the United States can defeat.—*Hoofnagle vs. Anderson*, 7 Wheaton, above referred to.

The letters of Messrs. Penrose and Riddick, above mentioned, are found in the second volume State Papers, by Gales and Seaton, pp. 448 and 451.

It being, in my opinion, the duty of the recorder of land titles, under the act of 1812, to take jurisdiction of claims to town or village lots, &c.; and he having, in the discharge of that duty, recommended the claim of Margarett Lachaisse for confirmation; and Congress having, in pursuance of his recommendation, confirmed that claim, I am therefore of opinion, that the two instructions asked by the plaintiff, from the Court of Common Pleas, ought to have been refused, and that the first instruction asked by the defendant in that case in that court, appellant here, ought to have been given. The appellant's second and third instruction prayed, seeming to me to differ in nothing but mere words from the first, were well enough refused.

It being further my opinion that the words, "out-lots or common-field lots," as they are used in the second section of the act of 13th June, 1812, are synonymous terms, I therefore conclude, that Congress did not intend to give to the town of St. Louis any land except what was known and marked out by survey of the proper officer as a town or common-field lot.

The fourth instruction, then, prayed by the defendant, ought, in my opinion, to have been given. This being my view of the case, it necessarily follows, that in my opinion the evidence of the incorporation of the town of St. Louis in 1809 was irrelevant, and ought to have been rejected. For the same reasons, I believe that the letter of the commissioner of the general land-office, and the evidence of the action of the surveyor of Illinois and Missouri, under his direction contained in that letter, was all irrelevant, except that part which tended to show that the president of the United States retained no part for military purposes, and that the land set apart by him for schools did not amount to more than one-twentieth part of the whole of the lands contained in the general survey of the town directed to be made by the first section of the act of 13th June, 1812.

For the above reasons, the judgment of the Court of Common Pleas ought, in my opinion, to be reversed: it is accordingly reversed and remanded.

BARRY vs. GAMBLE.

Ejectment.—By virtue of the act of Congress of 17th February, 1815, entitled, "An act for the relief of the Inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes," the recorder of land titles issued a certificate on the 30th November following, to B. L., (under whom plaintiff claimed,) or his legal representatives, authorizing him to locate 640 acres of land.

On the 7th July, 1817, T. H., by virtue of this certificate, located the land in controversy. The survey of this location was made in April, 1818. On the 13th June, 1827, a patent issued for this land to B. L., or his legal representatives.

The title of the defendant was founded on a confirmation made by the Supreme Court of the United States in 1830, to the representatives of James Mackay, the claim in question being included within the boundaries of said confirmation. (*Mackay vs. The United States*, 10 Peters, 340.) A patent for the land confirmed, including the land in controversy, issued to the legal representatives of said Mackay, dated 31st March, 1841. From the record of this suit, it appeared, that the action was instituted on the 25th May, 1829, under the act of Congress of 26th May, 1824, and the acts supplementary thereto, for the purpose of "enabling the claimants to lands within the limits of the State of Missouri, &c., to institute proceedings to try the validity of their claims." *Held*:

1. That, although a confirmation under said act of Congress of 26th May, 1824, vests in the confirmee all the proprietary interest of the United States in the land, and is in terms and in effect an acknowledgment that the title of the claimant was valid under the laws and usages of the former government, and protected by the treaty of cession, yet it does not follow that these confirmations recognise such claims as perfect and complete titles, or that they give to the claim of the confirmee, as against other claimants, any more validity than it would have had under the former government.
2. That the effect of a confirmation under the acts of Congress of 26th May, 1824, and 24th May, 1828, is only a relinquishment of title on the part of the United States, and does not affect the right or title of adverse claimants of the same land. Therefore, the confirmation and patent to the representatives of said Mackay amounted merely to a relinquishment of the title of the United States to the land in controversy.
3. That the land in controversy having been disposed of by the United States, within the meaning of the 11th section of said act of May 26, 1824, the defendant's confirmation in 1830 could not prevail over the plaintiff's patent issued in 1827.
4. That, without undertaking to decide whether a New Madrid certificate, issued under the said act of 17th February, 1815, could be located on unsurveyed lands of the United States, yet, when a patent has issued, the courts will presume that the steps preliminary to a valid disposition of the land have been taken, unless it can be made to appear, that when the location was made the land was expressly reserved from sale.

ERROR to Lincoln Circuit Court.

LAWLESS and CAMPBELL, for Plaintiffs in Error.

1. The decree of confirmation, and the patent issued thereon, in favor of the legal representatives of James Mackay, form a good title for the land in controversy, as against the United States, and one which will be indisputable, if the claim of the representatives of Lafleur be not valid. This position will not be denied.—10 Peters' Rep., 340, 100 3 Story's Laws 1841 1959; 4 Story's Laws, 2135, 2250.

2. The decree of the Supreme Court in favor of Mackay's representatives, is a confirmation in terms and in fact, *a confirmation strictly speaking*, and not a mere grant; and it recognizes the claim of Mackay as genuine and valid from the beginning, good according to the laws of Spain, the treaty of cession, and the laws of the United States. Of course, the claim and title take date from the date of the concession to him, and not merely from the date of the confirmation.

3. The location of the New Madrid claim of Lafleur, by Theodore Hunt, on the land in controversy, was illegal and void, because it was laid upon land which had never been surveyed, nor ordered to be sold by the president of the United States, and the sale of which, in fact, *was not authorized by law*.

4. The patent of Lafleur's representatives was illegal and void, because the original location thereof was unlawful, and it was issued for land which, at that time, did not belong to the United States.

5. The claim of Mackay has been distinctly recognized by the Supreme Court of the United States, as valid and genuine, and as such was protected by the law of nations, and the treaty of cession.

6. The limitations contained in the acts of 1824 and 1828, and other acts of Congress, do not bar any valid claim under the concession, the law of nations, or the treaty of cession, but merely such claims, or rights, as were furnished by, or arose under, the acts of Congress.

The limitations related to the remedy, and not to the right, and did not have the effect of annihilating the original title of the claimant.

7. The mere passage of an act of Congress, such as the act of 3d March, 1811, does not put land in the situation in which it can be said that *the sale thereof is authorized by law*; but it requires that the president and other ministerial officers should have acted under that law, so to make it lawful to sell the land, or to render the same *actually saleable*. The sale of the land is *unauthorized by law*, until it shall have been surveyed, the surveys approved, and the president shall have issued his proclamation under the law, and thereby authorized the sale of the land.

8. The act of Congress of 26th April, 1822, does not cure any defects in New Madrid locations, except those that arise from the want of conformity to the range, township, and sectional lines of the public surveys of the United States; and the necessity of making that exception, by the passage of that act, proves New Madrid locations, otherwise made, would have been considered irregular and void, without the aid of that law.

9. The Circuit Court erred in admitting testimony to invalidate or get behind the decree of the Supreme Court of the United States, viz., the depositions of Brown and Leduc, and the concession to Chouteau. The question of fraud attempted to be raised by that testimony was distinctly placed before the Supreme Court, and distinctly decided on by them. The question of fraud anterior to that decree, is decided by the decree; no fraudulent acts are alleged to have been resorted to, to obtain the decree.

Fraud, to be taken advantage of, must be taken advantage of at *the proper time*,

and before the proper tribunal, and when decided directly by such tribunal, the question cannot arise incidentally in the inferior courts.

10. The testimony is not sufficient to prove fraud, and the circumstances relied upon as fraudulent are amply explained by defendant.

GAMBLE and LEONARD, for Defendant in Error.

1. That the rejection by the court, of the notice filed in the surveyor's office, of Mackay's claim, was proper.—See Revised Code, 251.

2. That the depositions of Leduc and Browne were competent and legal testimony; and if they had not been, they had no effect whatever in the decision of the case.

3. That the concession and survey of Chouteau's claim, which was the northern boundary of the tract in dispute, was legal.

4. That the instruction given by the court below was a proper instruction, and was wholly independent of the evidence to which the defendant objected.

This point involves the following propositions:—

1st: That the defendant can have no benefit of an original Spanish grant, because he gave no such grant in evidence, and because, if he had given it in evidence, it was barred and nullified by the following acts of Congress:—act 2d March, 1805, sec. 4, 2 Story, 967; act 3d March, 1807, sec. 5, *Ibid.*, 1060; act 13th June, 1812, sec. 7, *Ibid.*, 1260; act 3d March, 1813, sec. 1; act 26th May, 1824, sec. 5 and 7, 3 Story, 1959.

These acts, in their operation upon such claims, are recognized by the Supreme Court of the United States as valid rules of decision.—*Strother vs. Lucas*, 12 Peters, 448.

2d: That the confirmation in favor of Mackay's representatives cannot avail the defendant against the title of the plaintiff, because the laws under which it is made expressly declares, that it shall have no effect as against that title, and the same is the law in relation to the patent upon that confirmation.—Act 24th May, 1828, sec. 2, 4 Storey, 2135.

3d: As neither the original grant, nor the confirmation, nor the Mackay patent, can avail the defendant against the Lafleur patent, he stands before the Court without title.

4th: That, if there had been an irregularity in the Lafleur title previous to the patent, the defendant cannot inquire into it.—3 Cond. Rep., 286, (9 Cranch, 87,) *Polk vs. Wendall*; 6 Cond. Rep., 350, (11 Wheaton, 380,) *Patterson vs. Wynne*; 1 Pet. Rep., 655, *Ross vs. Barland*; 13 Pet. Rep., 436, *Boguel & Byrne vs. Brod- rick*; 6 Mo. Rep., *Hunter vs. Hemphill*; *Jackson vs. Lawton*, 10 John. Rep., 23; *Stringer vs. Young's Lessee*, 3 Pet. Rep., 340; *Boardman vs. Lessees of Reed & Ford*, 6 Pet. Rep., 380.

5th: There was no such irregularity as is pretended, for the record does not show when the location was made. What the location is, appears in *Bagnall et al. vs. Broderick*, 13 Peters, 448.

Barry vs. Gamble.

NAPTON, Judge, delivered the opinion of the Court.

This was an action of ejectment, brought by Gamble against Barry, to recover a tract of land in St. Louis county. By change of venue, the case was removed to Lincoln county, where it was tried, and a verdict and judgment obtained for Gamble.

From an agreement entered on the record, it appears, that the plaintiff (Gamble) has all the title which vested in the representatives of Baptiste Lafleur, by virtue of a New Madrid location and patent in 1827, and that Barry holds all the title that arises under a decree of confirmation made by the Supreme Court of the United States, to the representatives of James Mackay, in 1830, and that Barry was in possession of the premises at the time the action was instituted.

It appears, from testimony offered on both sides in the court below, that the titles of Lafleur and the representatives of Mackay were as follows:—

By virtue of the act of 17th February, 1815, the recorder of land titles issued a certificate on the 30th November, 1815, to Baptiste Lafleur, or his legal representatives, authorizing him to locate six hundred and forty acres of land.

On the 7th July, 1817, Theodore Hunt, by virtue of this certificate, located the land in controversy.

The survey of this location was made by Joseph C. Brown, in April, 1818.

On the 13th June, 1827, a patent issued to Lafleur, or his legal representatives.

It was also offered to be proved, on the part of the defendant, that on the 13th August, 1824, Luke E. Lawless, as agent for Mackay's representatives, filed a *caveat*, or protest, against Hunt's location, in the surveyor-general's office, but the testimony was excluded.

The title of the defendant was founded on a confirmation made by the Supreme Court of the United States, in 1830, to the representatives of James Mackay. It appears, by the record of the suit in which this confirmation was made, that an action was instituted by the widow and heirs of James Mackay, under the act of May 26th, 1824, and the acts supplementary thereto, by a petition filed in the District Court on the 25th May, 1829, to procure a confirmation of a concession made by lieutenant-governor Delassus on the 14th September, 1799. This concession is in the usual form, and ordered the surveyor to put Mackay in possession of the tract petitioned for. It is stated by the petitioners, that the claim had not been filed with the recorder of land titles, or board of commissioners, the said concession having been sent to New Orleans by said James Mackay, and not returned in time to enable him to file the same. The final decree of the Supreme Court of the United States was at the January term, 1830, and was as follows:—

“It is ordered, adjudged, and decreed, that the decree of the said District Court in this case be, and the same is hereby, reversed; and, proceeding to render such decree as the said District Court ought to have rendered, it is further ordered, adjudged, and decreed, that the title of the petitioners to the land described in this petition to the District Court is valid by the laws and treaty aforesaid, and the same is hereby confirmed as therein described, and that the surveyor of the public

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lands in Missouri be, and he is hereby, directed to survey the quantity of land claimed in the place described in the petition, and grant or concession,—that he deliver to the petitioner a copy of such survey, and also do and perform," &c.

A patent for this land issued to Mackay's representatives, dated March 31st, 1841.

The plaintiff below, with a view to impeach the validity of the original concession of Delassus, gave in evidence, two depositions relating to the concession of an adjoining tract to Auguste Chouteau, and some admissions made by Mackay; but as the decision of the Circuit Court was based upon grounds entirely foreign to these matters, and the plaintiff derived no benefit whatever from this testimony, it is not deemed material that it should be noticed.

The defendant, Barry, also, for the purpose of showing the invalidity of the New Madrid location and patent, gave in evidence the president's proclamation, by which it appeared, that the lands in the township wherein this land lay was authorized to be sold in October, 1823.

This was all the evidence in the case, and upon this state of facts the Circuit Court instructed the jury, that the titles under the patent issued to Baptiste Lafluer, or his legal representatives, is a better title in law than the title under the confirmation to the heirs of Mackay, and therefore, under the agreement of the parties, the plaintiff is entitled to recover.

In investigating the respective value of these titles, the question which most naturally presents itself at the outset is, what is the effect of a confirmation under the act of 1824, and the acts supplementary thereto? If, as has been strongly urged at the bar, that confirmation was not a mere relinquishment of title, on the part of the United States, but a confirmation in law, as well as in terms; not a mere grant, but a confirmation recognizing the claim of Mackay as genuine and valid from its origin, good according to the laws of Spain, the treaty of cession, and the laws of the United States, and attaching itself, by relation, to the original concession, so as to exclude all intervening titles emanating from the federal government, the claim of the defendant in error is at an end.

The second section of the act of May 24, 1828, under which this claim was confirmed, would seem to leave this no longer an open question, but the zeal and ability with which this point has been urged by counsel, repels the supposition that it is yet considered settled.

A confirmation made under the act of 1824, and confirmations by statutory enactments subsequent to the investigation of the recorder and boards of commissioners, are unquestionably recognitions of pre-existing title, and not mere grants *de novo*. By them, all the proprietary interest of the United States is vested in the claimant, and it is in terms and in effect acknowledged, that the title of the claimant was valid, under the law and usages of the former government, and protected by the treaty of cession. It does not follow from this, however, that these confirmations recognize such claims as perfect and complete titles, or that they give them, as against other claimants, any more validity than they would have had under the former government.

And what was the condition and character of those concessions under the

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government of Spain?—they were orders of survey, or directions of the surveyor to put a party in possession of a tract of land, which he prayed for the purpose of inhabitation or cultivation. It never was supposed that such orders gave the party a *title*, or, indeed, that the lieutenant-governor of Upper Louisiana had any authority to *grant* lands: so that, if the Spanish authorities at New Orleans failed or refused, from any cause, to perfect the title conceded by the commandants at St. Louis, and made a different disposition of the same land, it is not pretended that the grant of the intendant-general would not, according to the laws of Spain, prevail over the rights of the person who had the inchoate title. The government of the United States, then, succeeding to the rights, and assuming the duties of the king of Spain, has the same power to grant a complete title to one notwithstanding the existence of an inchoate right in another, and in such event, a subsequent confirmation to the party holding the prior right could avail nothing, the government having parted with their interest before the confirmation.

That Congress was fully apprised of this, will be seen by an examination of all their acts on this subject. By the 11th section of the act of May 26th, 1824, it is provided, that if, in any case, it should so happen, that the lands decreed to the claimant, under the provisions of this act, shall have been sold by the United States, or otherwise disposed of, or if the same shall have been heretofore located, it shall be lawful for the party interested to enter, after the same shall have been offered at public sale, the like quantity of lands in any land-office in the State of Missouri.

It is apparent, that if the confirmations made under this act were intended to operate upon the inchoate titles, so as to cut off all intervening claims originating under the United States, this section was entirely superfluous. No title could have emanated from the federal government previous to the origin of the Spanish claim; and, upon the construction contended for, there would be nothing upon which this section could operate.

But the second section of the act of May 24, 1828, places this matter beyond controversy. That section declares, that "confirmations had by virtue of this act, and the patents issued thereon, shall operate only as relinquishments of title on the part of the United States, and shall in no wise affect the right or title, either in law or in equity, of adverse claimants of the same land."

Under this last act, the confirmation to Mackay's representatives was procured, and it cannot be doubted, whatever diversity of opinion may have existed in relation to the act of 1824, that this confirmation and patent amounted merely to a relinquishment of the title of the United States.

Such being the condition of the defendant's title, shall this confirmation in 1830 prevail over the patent of Lafleur in 1827? In other words, had the lands decreed to Mackay's representatives been sold by the United States, or otherwise disposed of, or had they been located, within the meaning of the eleventh section of the act of 1824?

By the provisions of an act to extend the time for locating Virginia military warrants, and for other purposes, passed March 2d, 1807, it was declared that

"no locations should be made on tracts of land for which patents had previously been issued, or which had been previously surveyed."

In the case of *Lindsay and Others vs. Lessee of Miller* (6 Peters' Rep., 672,) the Supreme Court of the United States were called upon to decide what surveys were protected by this proviso, and their conclusion was, that Congress did intend to protect surveys which had been irregularly made, but did not design to sanction void surveys.

Upon the authority of this case, as well as upon principle, it may be assumed, that the provisions of the eleventh section of the act of 1824 were not designed to protect sales or patents which were absolutely void; and the only matter remaining for inquiry, to decide the merits of the present case, will be, whether the patent issued to Lafluer in 1827 was void.

In the case of *Hoofnagle vs. Anderson*, (7 Wheaton, 212) the court held, that a patent was a title from its date, and conclusive against all those whose rights did not commence previous to its emanation.

In the case of *Jackson vs. Clark and Others*, (1 Peters' Rep., 628,) the same principle is asserted as the court held in the case of *Lindsay and Others vs. Lessee of Miller*, and an irregular survey was considered as protected by the proviso of the act of 1807.

In the case of *Polk's Lessee vs. Wendall*, (9 Cranch, 99,) the principle upon which that court has acted, in examining, at law, the validity of patents, is fully laid down and clearly illustrated. The chief justice, who delivered the opinion of the court in that case, said: "The laws for the sale of public lands provide many guards to secure the regularity of grants, to protect the incipient rights of individuals, and also to protect the State from imposition. Officers are appointed to superintend the business, and rules are framed, prescribing their duty. These rules are, in general, directory, and when all the proceedings are completed by a patent, issued by the authority of the State, a compliance with these rules is pre-supposed.

"That every pre-requisite has been performed, is an inference properly deducible, and which every man has a right to draw from the existence of the grant itself. It would, therefore, be extremely unreasonable to avoid a grant in any court, for irregularities in the conduct of those who are appointed by the Government to supervise the progressive course of a title from its commencement to its consummation in a patent.

"But there are some things so essential to the validity of a contract, that the great principles of justice and of law would be violated did there not exist some tribunal to which an injured party might appeal, and in which the means by which an elder title has been acquired might be examined."

After observing, that a court of equity is, in general, the most suitable tribunal for the adjustment of questions of this character, the judge proceeds:—"There are cases in which a grant is absolutely void; as, where the State has no title to the thing granted, or where the officer has no authority to issue the grant. In such cases, the validity of the grant is necessarily examinable at law."

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The general principle is here clearly laid down; the only difficulty is in ascertaining what acts are to be considered as irregularities, and what are essential to the validity of the grant. The facts upon which the court acted in that case, made out a case, in which the State attempted to convey lands to which they had no title. After the cession of a district of land from North Carolina to the United States, in 1789, North Carolina, by the terms of the deed of cession, had no authority to grant any more lands, except to such persons as had made entries prior to the cession.

It did not appear upon the face of the grant, that the title accrued before the cession, and the court allowed that matter to be examined into, and permitted the party contesting the patent to show that there was no entry, and no warrant authorized by the State of North Carolina, before the cession. Upon these facts appearing, the court held the patent void, for want of power in the State to make any such grant.

So, in the case of *McConnell's Lessee vs. Wilcox*, (13 Peters' Rep.,) it was held, that an entry with the receiver and register, of land expressly reserved from sale, was null.

In the case of *Sarpy vs. Papin*, (7 Mo. Rep.,) this Court held, that when an entry of land in the land-office had been made at a time when there was, by law, a reservation of the land from sale, and a patent issued after the reservation had been taken off, a party should not be permitted to go behind the patent to show such irregularity.

It is to be observed, however, that the opinion of the court in that case was founded on a mistaken assumption of the statute law. The act of May 22d, 1826, continuing the time of filing claims, under the act of May 26th, 1824, for two years longer, appears to have escaped the observation of the counsel in that case, as it certainly did of the court. The act is entitled, "An act for the relief of Phineas Underwood, and for other purposes;" and it is not singular, that neither the counsel nor the court should have thought of looking into an act with such a title, to find a general law respecting the settlement of land claims in Missouri. This act, not seeming from its title to be a public act, was not printed in Story's Compilation. The court proceeded on the assumption, that betwixt the expiration of the act of 1824 and the passage of the act of May 24th, 1828, there was an interval, during which the reservations of Spanish claims had been taken off by Congress, and the land declared public land, and, consequently, subject to be sold. That opinion, therefore, so far as that point is concerned, is entitled to no weight.

Where the State has no title to the land conveyed, it is obvious, that her grant can convey none; but what is meant by the court, in *Polk's Lessee vs. Wendall*, where they say, that it is also void when the officer has no authority to make the grant, admits of some doubt. Does the authority there spoken of apply to the incipient stages of the title, or to the period at which it is said to be consummated in a patent? Is it intended, that every step taken by the officers who superintend the stages of the title shall be in accordance with the mandates of the law? or was it meant merely, that when the title was perfected, and the grant issued, it should then be within the scope of the officers' power? It would seem, from the

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general tone of the Opinion, that irregularities in the officers, or failure to comply with any of the mandatory provisions of the statute, were not sufficient to avoid the grant. In no case, perhaps, has the court gone further than it did in the case of *Polk's Lessee vs. Wendall*; and it may therefore be safely assumed, as the result of the authorities, that the irregularities of subordinate agents, in the incipient stages of a title, cannot be investigated for the purpose of impeaching the grant, unless the acts are such as are essential to the contract, *and on the performance of which depends the power and authority of the State to make the grant.*

The act of February 17, 1815, for the relief of the inhabitants of New Madrid who suffered by earthquakes, permitted the owners of lands in New Madrid, on making a relinquishment to the Government, of their lands in that county, to locate a like quantity on any of the public lands, "*the sale of which was authorized by law.*" What lands are embraced under this description? Did Congress mean that all the land which the president, by the act of March 3, 1811, was authorized to bring into market and dispose of in the manner prescribed by that act, should be subject to location? or were the claimants under this act of 1815 restricted to such lands as had been actually surveyed?

This question, it appears from the public documents, excited much discussion immediately after the passage of the act; and the counsel for the plaintiff in error lays much stress upon the official opinions of Mr. Wirt, who was the attorney-general of the United States at the time this discussion arose, and who held, that locations could not be made until after the surveys; and that locations made anterior to the public surveys were mere nullities. Great respect is due to the opinion of Mr. Wirt; but it must be recollected, that these opinions were *ex parte*, and if contemporaneous construction is to have any weight with a court in the construction of a law, it will be found that the officers of the Government who had charge of this branch of the public service, and who, called upon in their official capacity to act under the law, differed widely from Mr. Wirt on this subject.

A reference to the public document shows, that the commissioner of the general land-office, and the surveyor-general acting under his instructions, allowed locations to be made upon any lands not reserved from sale. (2 Land Laws, "Instr.," &c., pp. 815, 816.) It is true, that the action of the department was subsequently confirmed to the official opinion of the attorney-general; yet, as late as 1821, after a correspondence between Major Berry and the treasury department, in which it was agreed to avoid the objections of Mr. Wirt, that re-locations should be made, we find the commissioner of the general land-office adhering to his first opinion, and suggesting the probability of an act of Congress which would sanction the irregular locations. His letter to the surveyor-general thus concludes: "The directions of the secretary, sent in my letter of the 5th of July, (and to which you allude,) are not imperative. The location *may* be withdrawn. I presume the holders of them will wait to see what may be done at the next session of Congress."—2 Land Laws, "Opinions," &c.

Accordingly, we find an act passed on the 26th day of April, 1822, the first section of which declares, that "the locations heretofore made, of warrants issued under the act of 15th February, 1815, if made in pursuance of the provisions of

that act in other respects, shall be perfected into grants in like manner as if they had conformed to the sectional or quarter-sectional lines of the public surveys."

It may be admitted, that this act leaves the question open as to what lands were liable to be located under the original act of 1815, yet it certainly deprives those who advocated the narrow construction of that law, of the foundation on which all their objections were based. The only apology for their construction of the act of 1815 was, that the admirable system of our public surveys should not be infringed; and when Congress, in 1822, passed this act, which recognized the validity of locations which did not conform to the public surveys, it mattered nothing, so far as this system was concerned, whether the locations had been made previously or subsequently to the public surveys.

The act of 1815 was designed as a gratuity to those who had suffered by earthquakes. Humanity and charity prompted the law, however much it may have been perverted to the purposes of fraud and speculation. Is it reasonable that, with such motives avowed on the face of the act, Congress should have postponed the execution of their charitable purposes until the completion of the public surveys? The sales, it appears from the public documents, did not take place until 1818, and in the township whereon the present claim was located, until 1823.

But the act itself, giving it either construction, did infringe, to some extent, upon the subdivisational arrangements of the public surveys. All locations between one hundred and sixty, and six hundred and forty acres, were departures from the general system. Moreover, all locations, of every description, were, by the second section, required to be surveyed by the deputy surveyor, and a plat to be made out and returned to the recorder. If locations could only be made on lands after the public surveys, it is plain that the duties imposed by this section were, in many instances, superfluous. In locating any quantity of acres which corresponded with the section or sectional subdivisions, after the public surveys, no new survey would have been necessary.

If the words, "authorized to be sold," are to be construed in a strict or limited sense, why should locations be allowed, where only *one* of the pre-requisites of the law has been complied with? Why stop at a survey, and dispense with the other steps equally mandatory on the officers, before a sale could be regularly made? The mere survey did not bring lands into market; land offices were to be established, officers appointed, and due notice given by the proclamation of the president, before a sale could take place under the act of 1811.

Whatever may be the proper construction of these words, in the act of 1815, (and we leave that question *sub judice*,) the above views of the act and of the construction which it received immediately after its passage, will show, that the pre-requisites provided by the act of 1811 were all on a like footing; that a survey, the establishment of land offices, the appointment of officers to superintend the sales, and a due notice of the time of sale by proclamation of the president, were all alike preliminary to a valid disposition of the public lands; that they were all duties entrusted to the president of the United States, and could all be performed without any further action on the part of Congress; that the locators under the act of 1815 were not in any worse condition, at least, than those who

were authorized to buy at public sale, and consequently these preliminary steps in obtaining the complete title, under the superintendence of the officers appointed by Government for that purpose, must be presumed to be regular, when a patent has issued, unless it can be made to appear, that when the location was made, the land was *expressly reserved from sale*.

This will be permitted, though the patent on its face is regular, and the facts must appear *aliunde*, and this is going as far as the doctrine of the court in *Polk's Lessee vs. Wendall* will warrant.

Let us, then, see whether this land, when the location was made, was expressly reserved from sale by the act of 1811. After reserving sixteenth sections, mineral lands, and salt springs, it is provided, "that, till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been in *due time, and according to law*, presented to the recorder of land titles in the district of Louisiana, and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the territory of Louisiana." Now, what was the law in relation to the time of filing these claims, when this act was passed? The fourth section of the act of 2d March, 1805, (Land Laws, p. 123,) declared, that every person claiming lands in the territory, by any French or Spanish grant made and completed before the 1st of October, 1800, or by virtue of any incomplete title, should, before the 1st of March, 1806, file with the register of the land-office or recorder of land titles, a notice of his claim; and further declared, that if any one failed to do so, such grant or incomplete title should never after be admitted as evidence in any court of the United States *against any grant derived from the United States*.

The fifth section of the act of March 3, 1807, extended the time of filing claims to the 1st of July, 1808, and declares, "that the rights of such persons as shall neglect so doing, within the time limited by this act, shall, so far as they are derived from or founded on any act of Congress, ever after be barred and become void, and the evidences of their claims never after admitted as evidence, in any court of law or equity whatever."

Such was the law at the time of the passage of the act of 1811. The act of February 17, 1818, makes provision for the establishment of additional land offices in the territory of Missouri; and the third section directs the president to offer for sale the surveyed lands, with the "same reservations and exceptions, and on the same terms and conditions," as was provided in the tenth section of the act of 1811.

The act of 13th June, 1812, allows *actual settlers* further time to file their claims; but it is clear, that all claims which were not filed with the recorder by the 1st July, 1808, were not within the reservation of the tenth section of the act of 1811,—they had not been filed in *due time, and according to law*.

The claim of Mackay, it appears from his petition to the District Court in 1829, had not been filed with the recorder, or brought before any board of commissioners: it was, therefore, not within the reservation of the act of March 3, 1811.

Congress, it is true, may disregard these acts of limitation, and may admit

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claims, as they did by the act of 1824, to be presented to their courts, notwithstanding they may have been barred; but this must not be to the prejudice of those rights which have accrued upon the faith of prior acts. When the patent issued to Baptiste Lafleur in 1827, there was no evidence on the public records of any claim set up by Mackay to the land in controversy: so far as that title depended upon the United States, it was barred, both at law and equity, by the acts of 1807 and 1811, and 1818. Up to 1827, when this patent issued, no effort, even under the act of 1824, was made by Mackay to bring this claim before the District Court of the United States; and it was not until 1829, two years after the patent had issued to Lafleur, that the claim was set up for the first time.

It was then too late; the United States had parted with their interest to Lafleur's representatives; and if Mackay's representatives had a title, such as the Supreme Court of the United States decided it to be, good according to the laws and usages of Spain, and protected by the treaty, which by delay was not ripened into a perfect title until after the fee had passed from the United States to another, they cannot justly complain of any breach of faith on the part of the United States.

The statutes of limitation, passed from time to time, advised them of the wishes of Congress: their claim being barred by these acts, they seek the bounty held out by the act of 1828, and must take it on the terms prescribed in the act.

Judgment affirmed.

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LITTLE & TOMPKINS vs. SEMPLE.

Where a carrier undertakes to deliver goods at a certain point, "*with privilege of re-shipping*" reserved in the bill of lading, his liability as common carrier continues until the goods are safely delivered at the point of destination. The privilege of re-shipment merely enables him to carry the goods in his own or some other vessel, but does not discharge him from any liability not excepted in the contract. Therefore, if the boat on which the goods are re-shipped deviates from her route, and is lost, the carrier is liable.

ERROR to St. Louis Court of Common Pleas.

HUDSON and HOLMES, for Plaintiff in Error.

1. That a transshipment from one vessel to another, except from necessity, is a deviation.—1 Phil. Ins., (2d edit.) ch. 12, sec. 1, p. 485; Story on Bail, sec. 562.
2. That a variation from the usual and direct course of the voyage, even but for a few leagues, is also a deviation.—1 Phil. Ins., 480, ch. 12, sec. 1; Hilbert et al. vs. Ibyn, cited in Delany vs. Stoddart, 1 T. Rep., 24.

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3. That, in case of a deviation, the carrier is liable for all subsequent losses, even those happening from inevitable accident.—Story on Bail, sec. 509; 1 Phil. Ins., 484; Abbott on Ship., 239, note 1, 218, note 1.

The only question intended to be raised by the demurrer was, as to what was the legal effect of the words, "with privilege of re-shipping:" it is, perhaps, rather a question of interpretation, than of law.

The plaintiff relies upon the following:—

4. That the whole effect of the above phrase is this; that if the carrier, for any reason, does not choose to carry the goods by the steamboat "Alpha," he may carry them by the steamboat "Omega," and the transshipment shall not be considered a deviation, as it otherwise would.—Dunseth vs. Wade et al., 2 Seam. Rep., 285; Pelly vs. Royal Exchange Assurance Co., 1 Burr. Rep., 341-348.

SPALDING and TIFFANY, for Defendant in Error.

1. If no privilege of re-shipment had been contained in the bill of lading, the carrier would still have had the right to re-ship, in case his own boat or vessel had been disabled.—Abbott on Shipping, 240; 1 Phil. on Ins., 590.

2. The privilege, therefore, in the bill of lading, that defendant, the carrier, had a right to re-ship, must mean something further than such right as exists, when a ship is disabled, to send on the cargo by some other vessel, to its destination.

3. This latter right (of employing another vessel when it is impossible to complete the voyage with the first) is called "*transshipment*." The privilege reserved in the present bill of lading is termed "*re-shipment*,"—a second shipment—a repetition of the original act of shipment, of which the bill of lading is the evidence, and therefore a totally different thing from transshipment.—Abbott on Shipping, 240, 243; 1 Phil. on Ins., 590; Stephens on Average, 363; Hughes on Ins., 125, 172, 402; Smith's Merc. Law, 180, 239; (15 Law Lib.)

4. The meaning of the bill of lading in question, containing the privilege of re-shipment, is, that the carrier will convey the goods safely as far as it may be convenient for him to go, and will then faithfully perform the duty of the forwarding merchant, in putting them on board a proper vessel for the port of destination.

NAPTON, Judge, delivered the opinion of the Court.

The plaintiffs brought an action of assumpsit in the St. Louis Court of Common Pleas, against the defendant, as one of the owners of the steamboat Meridian, upon a contract of affreightment. The plaintiffs shipped upon said boat, at Pittsburg, one hundred kegs of nails, of the value of five hundred and thirty-nine dollars and thirty-seven cents, to be delivered in good order at the port of Galena, in the State of Illinois, (the dangers of river navigation, fire, and unavoidable accidents excepted,) to the plaintiffs or their assigns, they paying therefor at the rate of fifty cents per keg, with privilege of re-shipping. The

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nails were re-shipped at St. Louis, upon the steamboat Illinois, with the privilege of deviating as far as Jefferson barracks, which is about ten miles out of the direct course to Galena: the Illinois did deviate thus far, and after leaving Jefferson barracks, on her voyage to Galena, struck a rock and sunk, whereby the nails were lost.

The defendant filed several pleas, in substance averring, that the said goods were shipped on the Meridian, with a privilege of re-shipping the same at any time during the voyage; and that, during the said voyage, whilst safely conveying such goods, she did re-ship the goods on board the Illinois, a good and staunch boat, then bound for, and about to proceed to Galena, to be safely carried and delivered according to said contract, &c.

To all these pleas there was a demurrer. The demurrer was overruled by the court, and the defendant had judgment on the demurrer. The sufficiency of the pleas is therefore the only question presented by the records, and this depends upon the construction of the words, "*with privilege of re-shipping*," contained in the bill of lading.

It is contended by the defendant in error, that the bill of lading containing the words, "*with privilege of re-shipping*," means that the carrier will convey the goods safely, as far as it may be convenient for him to go, and will then faithfully perform the duty of a forwarding merchant, in putting them on board a proper vessel for the port of destination.

We do not take this view of the contract. The contract is an entire one, for carrying the goods safely from Pittsburgh to Galena, and the consideration for the entire performance of the contract is fifty cents per keg. The privilege of re-shipping, reserved in the bill of freight, enabled the defendant to carry the goods to the port of destination, either in his own boat or any other vessel, but in either event, did not discharge him from any liability not excepted in the contract. Had the words, "*with privilege of re-shipping*," been omitted, the mere fact of re-shipping the goods on another boat, unless in case of necessity, would have been a deviation, and made him responsible. (Story on Bailment, sec. 562; Abbott on Shipping, chap. 3, sec. 1, 8.) By the insertion of this clause, he is at liberty to tranship, or re-ship on another boat, but his contract is not performed until the delivery of the goods at Galena. His compensation was for such delivery, and his liabilities should be commensurate thereto. The demurrer should have been sustained.

Judgment reversed, and cause remanded.



The State, to the use of Harl, vs. John Martin et al.

THE STATE, TO THE USE OF HARL, vs. JOHN MARTIN ET AL.

In action against a sheriff on his official bond, for failing to make proper return of an execution, the judgment on which the execution was issued is not the foundation of the action; therefore, a variance in the date of it will not be material. The official bond is the foundation of the action.

APPEAL from the Boone Circuit Court.

TODD and KIRTLEY, for Appellants.

That where the judgment offered in evidence is not the foundation of the action, and not made profert of by way of *patet per recordum*, a variance in the date is not sufficient to reject it in evidence, it being stated by way of inducement.

LEONARD and GORDON, for Appellees.

The only question presented by the record, for the decision of this Court, is, Did the court properly reject the record of the judgment offered in evidence by the plaintiff? It is contended, in support of the judgment below, that the court properly refused to permit said record to be read on the trial of the cause, for the reason, that the judgment mentioned in the plaintiff's declaration, and the one offered in evidence, varied in date.

TOMPKINS, Judge, delivered the opinion of the Court.

The State of Missouri, for the use of Lewis H. Harl, sued John Martin and others, in the Circuit Court of Boone county. Judgment was given for defendants; and, to reverse it, this appeal is taken.

Martin was sheriff of Boone county; and the suit was brought against him and his sureties on his official bond. After setting out the bond in the declaration, it is averred, that whereas one Lewis Harl, for whose use and benefit this action is brought, did, on the 14th day of April, in the year 1839, by the judgment of the Boone Circuit Court, recover, against one James T. Connelly, the sum of, &c.

The record produced in evidence showed, that the judgment was rendered on the 15th day of April, 1840. The Circuit Court rejected the writing for this variance; and this act of the court is assigned for error.

If, in this declaration, the plaintiff had not set out correctly the bond, which is the foundation of the action, the defendant might have craved oyer, and demurred; or if, on a plea of *non est factum*, with an affidavit, he imposed the *onus probandi* on the plaintiff, a bond of a different date could not have been given in evidence,

The State, to the use of Harl, vs. John Martin et al.—Chase vs. Chase.

to support the declaration; because that on which the action is founded must be correctly stated, in order that the defendant may not be twice sued on the same instrument of writing. But the record here is not declared on; or in other words, this record is not the foundation of the action.

It is, then, not material, that the date be correctly set out. See the case of *Martin vs. Miller*, 3 Mo. Rep., p. 136., where it is said the rule is stated to be, that when a particular fact is to be tried, a variance in the date will not be material, although it is proved by a record, or other written evidence; provided, the same be not alleged as descriptive of the record, by means of a *proul patet per recordum*, or otherwise.—See the authorities there cited.

The judgment of the Circuit Court is reversed; and the cause remanded, to be proceeded in conformably with this opinion.

CHASE vs. CHASE.

On an appeal from the judgment of a justice of the peace, the defendant will not be allowed to plead a set-off by way of plea *puis darien continuance*, the statute expressly declaring, that “no set-off shall be pleaded in the Circuit Court that was not pleaded before the justice, if the summons was served on the person of the defendant.”—See “Justices’ Courts,” R. S. 1835, art. 8, sec. 16, p. 371.

ERROR to Ray Circuit Court.

P. L. EDWARDS, for Plaintiff in Error.

1. The defence offered by the defendant could only be allowed by way of set-off.
2. The same cause of action, and no other, which was tried before the justice, shall (on appeal) be tried in the Circuit Court: and no off-set shall be pleaded in the Circuit Court, which was not pleaded before the justice, if the summons was served on the person of the defendant.—Rev. Stat., 371, sec. 16.
3. If it had been competent for the defendant to plead an off-set, *puis darien continuance*, he could only do so by filing a bill of items, and giving notice before trial.—Rev. Stat., 354, sec. 10.
4. But the demand offered in off-set exceeded the jurisdiction of the justice.—Rev. Stat., 354, sec. 9.
5. The testimony introduced by defendant was incompetent: and if admissible, it does not support the defence, for it neither proves money paid to the use, nor at the request, of the plaintiff.

G. W. DUNN, for Defendant in Error.

1. In an action of debt, the defendant may, under the general issue, give in evidence payment, or whatever shows that nothing was due at the time the action was brought.—2d vol. Starkie's Evidence, 465.

2. As the defence arose after the issue was joined, the defendant had a right to avail himself of it, under his plea, *puis darien continuance*.—1 Chitty's Pleading, 695.

3. The payment made by the defendant to the creditor, to whom plaintiff and defendant were jointly legally liable, is as available, for the purposes of this defence, as a payment to the plaintiff.—Statutes of Missouri, 359, sec. 6, and 370, sec. 8.

TOMPKINS, Judge, delivered the opinion of the Court.

George R. Chase sued Abraham Chase before a justice of the peace in Ray county, and there had a judgment in his favor. Abraham Chase appealed to the Circuit Court, where he obtained a judgment in his favor; and, to reverse that judgment of the Circuit Court, George R. Chase prosecutes this appeal.

The record shows that the appellant, George R. Chase, sued Abraham Chase on a note for \$37; and that, after the appeal was taken to the Circuit Court, Abraham Chase, the appellee, paid, after this cause was brought into the Circuit Court, a debt which he and George R. Chase were jointly bound to pay; and that the Circuit Court permitted him to plead that money paid, for George R. Chase, as a set-off.

The sixteenth section of the eighth article of the act to establish justices' courts provides, that "the same cause of action, and no other, that was tried before the justice, shall be tried before the Circuit Court upon appeal, and no set-off shall be pleaded in the Circuit Court that was not pleaded before the justice, if the summons was served on the person of the defendant." The appellee, Abraham Chase, appeared in person before the justice, and defended his suit.

The judgment of the Circuit Court is reversed; and the cause remanded, to be proceeded in conformably to this opinion.

RAYBURN vs. DEAVER.

R., as the security of S., entered into bond to the sheriff of St. Louis county in the sum of *thirteen* dollars, conditioned for the return, &c., of property levied on in attachment against S., &c., stated in the condition to be worth *seven hundred* dollars. The Circuit Court, on motion, under the act of February 15th, 1841, concerning attachments, (Laws of Mo., session acts 1840-1, p. 15,) rendered judgment on the bond, against R., for the sum of six hundred and sixty-two dollars and eighty-three cents. *Held:*

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- . That although it might be conjectured, from the condition, that there was an omission of a part of the sum designed to be inserted in the penal part of the bond, yet as it was free from ambiguity on its face, the application of the ordinary rules of construction, in cases of ambiguity, were not applicable, and the court, therefore, erred in rendering judgment for more than the penal sum.
2. It is the peculiar province of courts of equity to relieve against mistakes and omissions; but courts of law act on the contracts of parties as they find them, only applying the rules of construction where the instrument is ambiguous on its face.

APPEAL from St. Louis Circuit Court.

POLK, for Appellant.

1. The court below committed error in rendering judgment against appellant for \$662 83, when the bond is only \$13.
2. As the bond in this case was executed on the 30th June, 1838, and the act of the legislature on which the motion was based was not passed until the 15th of February, 1841, the Circuit Court did wrong to entertain the motion of plaintiff below, and give judgment against the appellant, upon it, in a summary way.
3. The record, in this case, does not show that any execution ever issued on the judgment against Bogardus and Snowden. But it is not only necessary that execution should have *issued*, but it should also have been *returned no property found*.—See acts of 1840, '41, p. 15.

PRIMM and TAYLOR, for Appellee.

1. The judgment was properly entered up under the act of 1841, concerning attachments. It is well settled, that a party can enforce the payment of a claim accruing during the existence of one remedial law, according to the mode prescribed by a subsequent remedial law.—2 Cowen, 626; 4 Wheaton, 200, 204; 12 Wheaton, 378; and the case decided by the United States Supreme Court at the January term, 1843, entitled, "Arthur Bronson vs. John H. Kinzie et al.," which is direct in point.
2. There was no error in the court supposing the bond to be for \$13, as it is very apparent it was a mere clerical omission, and was sustained by common sense, by the obvious intentions of the obligors as deduced from the law under which the bond was given, and the very words of the bond itself.—See case of Grant and Finney vs. Brotherton's Administrators, &c., 7 Mo. Rep., 458; the reasoning of which case applies with great force here.

HUDSON and HOLMES, for Appellee.

After verdict and judgment every thing will be presumed in law to have been done, which was necessary to have been done, in order to entitle the party to such verdict and judgment.—Greenl. on Evidence, sec. 19; 4 Dallas, 97; Catten vs. Hood's Executors, Greenl., 20, sec. 539.

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NAPTON, Judge, delivered the opinion of the Court.

Deaver commenced an action of assumpsit against Alonzo Bogardus and Arthur Snowden, and sued out a writ of attachment, after making the necessary affidavit. By virtue of this writ, the sheriff levied on goods and chattels to the value of seven hundred dollars, which goods were restored to the defendants on their entering into bond to the plaintiff, in conformity to the provisions of the statute.

The penal portion of the bond reads as follows:—"Know all men by these presents, that we, Robert R. Snowden, as principal, and Samuel S. Rayburn, as security, are indebted unto James Brotherton, sheriff of St. Louis county, or his assigns, in the sum of thirteen dollars, for the payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this 30th June, 1838." The condition annexed to this obligation was for the return of the property levied on, specified in the terms of the condition, and stated to be worth seven hundred dollars.

Judgment went for the plaintiff at the April term, 1841, for six hundred dollars, upon which judgment a writ of *fiery facias* issued, and returned *nulla bona* by the sheriff of St. Louis county.

At the July term, 1841, the appellee moved the court to amend the aforesaid bond, by inserting the word "hundred" after the word "thirteen" in the penal part of the bond: which amendment was so ordered.

At a subsequent period of the same term, the appellant moved the court to set aside said order of amendment, which motion was sustained, and the order of amendment rescinded, and the amendment expunged.

At the July term, 1842, appellee moved the court for judgment against the principal and security in the aforesaid bond, in pursuance of an act for the recovery of debts by attachment, approved February 15th, 1841, and thereupon judgment was rendered against the appellant for \$662 83, being the amount of the judgment against Snowden and Bogardus, with interest and costs.

From this judgment, Rayburn, the security, appeals to this Court.

The appellant, for a reversal of judgment, relies on the fact that the judgment is for a sum exceeding the penalty of the bond.

As the judgment of the Circuit Court was given on the bond in its original shape, the amendment which had been first allowed having been cancelled, the propriety of the action of that court in allowing the amendment is not a subject of inquiry now.

Could the court, then, enter up a judgment for six hundred dollars, when the bond of the party was only for thirteen dollars?

This was clearly erroneous, unless the court was at liberty, by some rule of construction, to supply the word "hundred," and consider the bond as a bond for thirteen hundred dollars.

The case of Grant and Finney vs. Brotherton's Administrators is relied on by the appellee, to justify this construction of the bond. The case, we think, is not in point. There the penalty of the bond was "five hundred;" but the kind of money was not specified, an omission which, if not supplied by some rule of

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construction, rendered the bond entirely unintelligible and ineffectual. The bond, on its face, was ambiguous. Here the bond presents no difficulties on its face; and though we might conjecture, from its condition, that there was an omission of a part of the sum designed to be inserted, yet if we undertake to supply the omitted word, we rather correct a mistake, than construe an instrument.

The antecedent condition necessary in all cases to the application of rules of construction, is the existence of ambiguity or omissions apparent on the face of the instrument.

When there is no ambiguity, no omission apparent on its face, no construction is necessary. Courts of equity are established, whose peculiar province it is to relieve against mistakes and omissions; but courts of law act on the contracts of parties as they find them, applying, when doubts arise, those reasonable rules of construction which have been devised by the wisdom of ages, and whose main object is to ascertain the true intent and meaning of the parties.

Judgment reversed.

SCOTT, *Judge*, absent, from indisposition.

MAGUIRE vs. CONRAN.

Where a note is not negotiable, within the meaning of the sixth section of the act concerning bonds and notes, (R. S. 1835, p. 105,) for want of the words, "negotiable and payable," the nature of the defence of the maker is not changed by the assignment, although the note may purport to be payable "without defalcation."

ERROR to St. Louis Court of Common Pleas.

HAMILTON, *for Plaintiff in Error*.

1. The statute excludes this defence.—R. L., 105, sec. 4; *Green's N. I. Rep.*, p. 1; 4 *Halstead*, 130, 134, under a similar statute.

2. The plea is not good. It is not a plea of no consideration, for one is shown: it is not a valid plea of a failure of consideration, for that, such as it was, was executed. It amounts simply to a partial failure only, if any thing, for the party has still the use and possession of what he purchased. It does not aver that the party had no right whatever, nor does it set out such facts as that, if judgment be given for the defendant on this plea, it would entirely bar an action by him against

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the payee, on the implied warranty of title. This is essential to a plea impeaching the consideration of a note on the ground of want of title to the thing which constitutes the consideration. For aught that appears from said plea, Moore, himself, may well be the owner in fee of the land, or, at all events, may since have acquired full right to quarry, &c. This case falls within the rule established in 1 Mo. Rep., 414, there being a warranty, no intimation of fraud, the party still being in possession and use of what he purchased, &c.—5 Monroe, 293; 5 Littell, 249; 3 J. J. Marshall, 113; 1 A. K. Marshall, 177; 2 Wheaton, 13; 3 Ohio Rep., 285.

GAMBLE and BATES, for Defendant in Error.

The action was brought by Maguire against Conran by petition in debt, on a promissory note made by Conran to Robert N. Moore, and by him assigned to Maguire.

The note was not negotiable according to the terms of the statute, not having the words "negotiable and payable," but it was to be "paid without defalcation."

Conran pleaded that the sole consideration for the note was, that Moore, the payee, sold and assigned to Conran a license and right to quarry stone on certain lands belonging to the estate of John Mullanphy; Moore affirming that he had a good and sufficient license to quarry stone on the land, and good right to sell and assign the said license to Conran. The plea avers, that Moore had no such valid license, nor any power to authorize Conran to quarry stone on the land, but that Conran was responsible to the owners of the land as a trespasser, for quarrying stone under said pretended license.

Maguire demurred to the plea; the court overruled the demurrer, and gave judgment thereon for Conran. This writ of error is prosecuted, to reverse the judgment.

The plea is a plea of total failure of consideration, and such plea is good to the note sued on.—Maupin and Jamison vs. Smith, 7 Mo. Rep., 402.

TOMPKINS, Judge, delivered the opinion of the Court.

John Maguire sued James Conran in the Court of Common Pleas, and judgment being there given against him, he now prosecutes his writ of error to reverse that judgment.

The suit was brought on a note made payable to the order of Robert N. Moore, for value received, without defalcation or discount, and the note was assigned to Maguire by the payee.

The maker of the note pleaded that the note in the petition mentioned was made and given by the defendant to the said Moore, for the sole consideration that the said Moore, at, &c., did sell and assign to the defendant a certain license and right to quarry rock in and upon certain land, &c., which belonged to the estate of the late John Mullanphy; and the said Moore then and there affirmed that he had a good and sufficient license to quarry stone in and upon said land, and a good

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right to assign and sell such license, so as to authorize the said defendant to quarry stone there; and the defendant then averred, that at the time said Moore had no sufficient license, &c., as aforesaid.

The plaintiff demurred to the plea, and judgment in the demurrer being for the defendant, the question is, Did the Court of Common Pleas commit error in sustaining the demurrer?

The note is not negotiable under our statute.—See the act concerning bonds and notes, sec. 6, p. 105, of the Digest of 1835.

Therefore, the nature of the defence not being changed by the assignment of Moore to Maguire, the demurrer was properly overruled.—See third section of the same act above-cited; see, also, 7 Mo. Rep., 402, *Maupin and Jamison vs. Smith*.

The judgment of the Court of Common Pleas will, then, be affirmed.

MCLEAN vs. RUTHERFORD.

1. Where a person undertakes, without reward, to sell and dispose of the property of another, in the same manner as though it was his own, he is liable only for gross negligence, and is not bound, under such a contract, "to dispose of the same as a prudent man would of his own."
2. Where, under such a contract, a person undertakes to drive the horses of another to a distant market, and there sell them as he would his own, and he is taken ill by the way, and so unable to take charge and dispose of them in person, he may employ an agent for such purpose, without incurring any additional liability.
3. A party cannot give in evidence, in his own favor, his own declarations, when not made in the presence of the other party.

APPEAL from Randolph Circuit Court.

DAVIS, *for Appellants*, insists—

1. That the evidence of Granville Wilcoxson ought to have been excluded from the jury.
2. That a new trial ought to have been granted.
3. That the instructions of the court, asked by the plaintiff, ought not to have been given.
4. That upon the facts proved, the plaintiff had no right to a recovery.—3 Mo. Rep., 317.

As to the powers of the agent, see 6 John. Rep., 69, *Van Allen and Another vs. Vanderpool et al.*; 6 Cowen, 186, *Corlies vs. Cumming*.

McLean vs. Rutherford.

CLARK, for Appellee, insists—

1. That the defendant was the agent or bailee of the plaintiff, and as such was bound for at least ordinary diligence; and that, from the evidence in this cause, the jury were authorized to find that he had not used ordinary prudence in the sale and disposition of the plaintiff's property; and that, by his negligence, the sale and proceeds of said horses were lost.—8 Story on Bail, 296, 7; 4 Bibb, 282; 2 Bibb, 399.

2. That, notwithstanding the defendant may have used the same care and diligence in the sale and management of the plaintiff's horses, that he did with his own, he is liable, unless that was such as a prudent man would use.—Story on Bail, 15, 16, 46, 7.

3. That the evidence shows sufficiently clear that the plaintiff called upon the defendant to account before suit was brought.

4. The instructions for the plaintiff were well given, and are sustained by the evidence in the cause, and by law.

5. But if this court should consider that the defendant in this case was bound to use slight diligence only; still the judgment ought to be affirmed, as the case, from the whole of the instructions given, was presented to the jury upon that principle.—Story, 46, 7; Chitty on Contracts, 144.

TOMPKINS, Judge, delivered the opinion of the Court.

Shelton Rutherford brought his action in the Circuit Court of Randolph county, against Charles McLean, and having obtained a judgment against him, McLean prosecutes this appeal.

It appeared in evidence, that in December of the year 1838, the defendant, Charles McLean, was about to leave his place of residence in Randolph county, with a drove of mules and horses for the southern market.

A witness of the plaintiff stated, that, on the morning when the defendant started, he assisted the plaintiff, a neighbor of the defendant, in driving to the defendant's place of residence seven horses, which the defendant received into his drove. The witness said, he knew nothing about the terms on which the defendant received the horses from the plaintiff; that he heard the plaintiff say to the defendant, at the same time, that he wanted him to sell the horses for some price, that he wanted money and must have it, and did not wish him to return the horses. This witness believed the horses to be of "*various values, ranging from sixty to eighty dollars.*"

Another witness of Rutherford, the appellee, stated, that some time after the return of the defendant from the South, he started, in company with the plaintiff, to the house of the defendant, and that before they arrived there, they found the defendant at the house of a neighbor. The witness left them together, and pursued his own business. On his return he found the plaintiff and defendant at the house of the defendant, and there, he stated that, he heard a conversation betwixt them, something about the horses taken away by the defendant for the plaintiff, but he

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did not recollect the particulars. The plaintiff then asked the witness to state whether he knew, from the plaintiff's statements, before they went to the house of the defendant, what was the business of the plaintiff at the defendant's house.

The counsel of the defendant objected to this question, and excepted to the opinion of the court overruling the objection. The answer of the witness not being satisfactory, the plaintiff asked him, if he had not at the same time told him that he was going to try to settle with the defendant. This was also objected to by the defendant, but the court allowed the question to be put, and the defendant excepted. To the last question put and excepted to as aforesaid, the witness answered, that while they were on their way to the defendant's house, the plaintiff stated that he wished to have a settlement with the defendant, and that the defendant was not present. The plaintiff then asked the witness what he inferred, from what the plaintiff said whilst they were going to the defendant's house, was the business of the plaintiff there. The question being objected to, the court permitted it to be answered, and the witness stated, that his inference was, that the plaintiff desired to have a settlement with the defendant, but he denied that he had heard the plaintiff request any settlement with the defendant, but said, he had heard the plaintiff make the statement when they were going to the house of the defendant; the witness stated that he did not hear the plaintiff make any express demand of a settlement with the defendant about the matter, nor did he hear the plaintiff make any express demand of the horses, but heard conversation in relation to the defendant's expedition to the South, and to some unsettled matter between them in relation to the trade to the South.

The defendant then introduced his witnesses, one of whom stated, that he sent three mules with the defendant, to be sold at the same time with the plaintiff's: and that, when the defendant was about to leave home with his drove, he heard the plaintiff, in a conversation with himself and one Smith, now dead, as to the terms on which the defendant was taking stock for others, say, that he had delivered his horses to the defendant to do with and dispose of as he would do with his own; and that the plaintiff further remarked, in the same conversation, that whatever the defendant did, good or bad, he would be satisfied with.

Another witness, but son of the defendant, testified also, that the plaintiff had given the defendant authority to sell and dispose of the horses as his own.

This last witness, and another who accompanied the defendant, stated, that the plaintiff's horses were in low order when they were put into the drove; that at St. Charles they were detained by the ice running in the Missouri, and drove the horses down the river below St. Charles, for the purpose of getting food conveniently for the horses, where one of the plaintiff's horses had his thigh broken by a fall (as was supposed) on the ice; that the drove, consisting of about ninety head, sixteen or twenty of which only were horses, and the rest mules, passed through Kentucky and Tennessee, into Alabama and Mississippi; that the defendant, about the time he crossed the Tennessee line, became indisposed, and was unable to attend personally to his business; that when they arrived at Pickens, in Alabama, but few of the stock had been disposed of, and those sold were mostly mules, sold on credit, and that none of the plaintiff's horses had been sold; that

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there the defendant exchanged two of the plaintiff's horses for mules, and also two of his own: that the plaintiff's horses were thin when they were put into the drove, and had become too lean to be saleable, and the mules were considered more saleable; that the defendant went thence to Decatur, in Mississippi, and the four mules escaped and were never afterwards found, though search was made. At Decatur, defendant employed one Adams to assist him in disposing of the stock. The defendant finding it impossible to sell the stock for good money, sold, betwixt Decatur and Pickens, several head of it for Decatur money, amongst them two of the plaintiff's horses. The Decatur money was not current except in the vicinity of the bank, where it would be taken for travelling expenses and in ordinary transactions. That he sold the remaining part of the drove through an arrangement with the bank, agreeing to take a bill of exchange drawn by the bank on a house in New Orleans.

All the Decatur money previously received was deposited in the bank, and that also was included in the bill of exchange. This bill was for \$6,700: the draft was protested on presentment. The defendant's agent returned to Decatur about the 1st of March, 1839; there he, the son of the defendant, made a new arrangement with the bank, the officers assuring him that another bill would be accepted, if it were not presented before the 20th of May then next.

This bill was also protested, and left to be sued on, or collected in any way that might be most proper. The witness said, the draft on New Orleans was all lost; that defendant had not received any thing on it; that the defendant was taken sick from the time he crossed the Tennessee line, and continued to be too much indisposed to transact much business himself.

That the defendant sold his drove for Decatur money because, at that time, the bank had been drawing on Mobile, and had advertised to draw on New Orleans in May then next. This witness further stated, that on his return from the South, he called at the plaintiff's house, and told him, he believed all was lost, to which the plaintiff replied, that he was satisfied the defendant had done the best he could, and that he had delivered his horses to the defendant to do as he could with his own.

The plaintiff then asked the court these instructions:—

1. If the jury believe the plaintiff delivered to the defendant any number of horses to be carried to the South, and sold for money, and the money to be returned to the plaintiff; and that the plaintiff, after the defendant returned, had applied to the defendant for a settlement, and that the defendant had not paid or accounted for said horses, they will find for the plaintiff the worth of said horses, deducting a reasonable sum for expenses and the trouble of selling.

2. That if the horses were given to the defendant to sell or dispose of, the defendant is bound, under such a contract, to dispose of the same as a prudent man would of his own.

3. That the defendant had no power, unless given him by contract, to depute or employ any other person to dispose of the stock for the plaintiff, unless it was by the consent of the plaintiff, either express or implied.

The plaintiff asked other instructions, which it is not thought material to

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notice. All of them were objected to, and the decision of the court, overruling the objections, was excepted to.

All the instructions asked by the defendant being given, it becomes necessary only to inquire whether those given to the plaintiff were exceptionable.

The first instruction assumes, that evidence was given that the defendant undertook to sell the horses of the plaintiff for money, and to return the money to the plaintiff. There is no evidence on the record of any such agreement made by the defendant. The plaintiff's witness stated, that the plaintiff told the defendant, when the horses were delivered, that he wished them to be sold for some price; that he wanted money and must have it, and did not wish him to return the horses.

The positive declaration of the plaintiff, that he did not wish the horses to be returned to him, prepares us to believe very readily, that the two witnesses of the defendant were correct in their statement of the contract, that the defendant would do with and dispose of them as he would of his own. The witness, Collins, who sent mules to be sold by defendant, stated also, that on the day the defendant departed with his drove, he heard the plaintiff tell Smith (who also had sent a horse) that he had sent his horses with the defendant to do with as he could with his own, and that whatever he did, good or bad, he would be satisfied with it. The first instruction, then, was erroneously given.

The second instruction assumes it to be law, that the defendant, when he undertook to sell the plaintiff's horses as he would his own, was bound to use the diligence of a prudent man. Sir William Jones says, that when a man undertakes to do work for hire without any special agreement as to the degree of diligence, "In whatever point of view we consider this bailment, no more is regularly demanded of the bailee than the care which every prudent man takes of his own property." (See Jones on Bailments, p. 104, title, "Hiring of work," and p. 109.) The evidence in the cause induces a belief, that the plaintiff had great confidence in the integrity of the defendant; that he considered it a favor to be able to get the defendant to receive his horses into the drove; and at that season of the year (in December) few honest men would be willing to undertake to drive horses to a distant market, except on a special contract. The plaintiff seems to have been profuse of his expressions of confidence in the integrity of the defendant, not only before he knew the result of the business, but even afterwards, if the testimony of the son of the defendant is to be credited.

On a special contract like this, it is difficult to conceive that any thing, short of such gross negligence as would raise a presumption of fraud, could make the defendant liable; and it would be difficult to presume fraud, where the defendant was equally loser with the plaintiff. All the authorities cited by the plaintiff turn on the degree of diligence required of a bailee for reward, where no special contract is made, except one, viz., *Francis vs. Castleman*, 4 Bibb, 282. The defendant had taken leather to sell for the plaintiff, and it was put in his cellar with his own, and lost by fire. His plea was adjudged bad, because he did not aver that he had used proper diligence to sell it, and had failed.

Here the general issue was pleaded, and, consistently with this authority, the

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plaintiff might have asked the court to tell the jury the defendant was bound to prove he had used the same diligence to sell the plaintiff's property as to sell his own. The court erred in giving this instruction.

The third instruction is an abstract proposition, which cannot be denied, but the question here is, whether, by the terms on which the plaintiff's horses were received, he did not authorize the defendant to employ an agent. The defendant received the horses to be disposed of as his own.

His ill-health compelled him, the witnesses state, to employ an agent; they also state that it became necessary to employ a man who knew the country better than they did.

This third instruction, then, seems to have been wrongly given.

Three other instructions were given for the plaintiff, to which the defendant excepted, but as they all turned on negligence, or supposed negligence, of the defendant, in the sale of the horses for bad money, and the want of diligence in collecting, it seems to be a sufficient answer, that the defendant appears, by the testimony, to have lost his own money too, and therefore the instructions are wrong.

The plaintiff also, under the direction of the court, drew from his own witness the statements made by himself to the witness in the absence of the defendant, to prove that he, plaintiff, had demanded a settlement with the defendant before this suit was brought; and the witness was also directed to tell, what he inferred was the business of the plaintiff at the house of the defendant, when they were going there together. And the admission of this evidence, it is contended, is right, because it is said the plaintiff's declarations and the witnesses inferences were *pars rei gestæ*.

I understand, that if A kill B, the slayer may give in evidence his declarations and conduct on the occasion, to prove himself innocent of maliciously shedding the blood of his fellow creature. Because, say the books, his declarations on the occasion, and his whole conduct, are *pars rei gestæ*; for, by the manner of the slayer on the occasion, we arrive at our conclusions as to his intentions. But here the thing to be proved was, that Rutherford demanded a settlement of McLean; and the thing the parties were doing when Rutherford required the witness to testify as to his statements and the inferences of the witness, was to ride along the road.

It appears to me a very awkward way to find out whether Rutherford afterwards demanded a settlement.

For what reasons such questions can be asked, is not obvious to me. The witness stated, he heard the plaintiff talking to the defendant about the expedition to the South, and some unsettled account between them in relation to the trade to the South, and this alone was sufficient to satisfy a jury, a little acquainted with the nature of man, that the settlement had been demanded.

I cannot imagine a case in matters of contract, where a plaintiff ought to be allowed to establish his demand against the defendant by his own declarations, made in the absence of the defendant.

The judgment of the Circuit Court is reversed, and the cause remanded.

McLean vs. Rutherford.—Bogart vs. Green and Rogers.

SCOTT, *Judge*.—The judgment should, in my opinion, be reversed, for the second instruction given at the instance of the plaintiff.

The contract, or undertaking, assumed by that instruction, did not warrant the principle it contained. Under the contract assumed, the defendant could only be responsible for fraud.—Story on Bailment, 46.

The court improperly admitted the evidence of the declarations of plaintiff which was offered by the plaintiff himself.

NAPTON, *Judge*.—The special undertaking of the defendant in this case, supposing it to have been without reward, to dispose of the plaintiff's property as his own, made the defendant liable only for gross negligence.

It was not necessary, however, that such negligence should amount to fraud; for even in this view of his responsibility, the fact, that the defendant's property shared the fate of the plaintiff's, whilst it repels the presumption of fraud, would not in all cases excuse the defendant. (Story on Bailment, 43.) A man may, in respect to his own property, be willing to encounter extraordinary risks, or adventure upon mere gambling speculations, with a view to particular advantage, or from a natural disposition to rashness, which would be entirely unjustifiable in respect to the custody of the goods of another. (6 Rob., 316.) Thus, where a person had a deposit of money, and put it with his own in a valise on board a steamboat, and left it there in an exposed situation all night, and it was stolen and his own money left, he was held responsible for gross negligence.—Story on Bailment, 47.

The instruction given by the court, which held the defendant bound to that degree of diligence which a prudent man would exercise about his own affairs, and which is no more nor less than what the books term ordinary diligence, was not correct on the hypothesis of a contract by defendant to dispose of the plaintiff's property as his own. In such a contract, the defendant was only responsible for gross negligence.

For this reason, I concur in reversing the judgment.

BOGART vs. GREEN AND ROGERS.

1. The securities of a constable are not liable, on the official bond, for the amount of notes, &c., placed in his hands for collection, and by him collected; they are only liable where the money has been paid to the constable after the commencement of suit, or after judgment. (See "Justices' Courts," art. 2, sec. 21, and art. 7, sec. 18, R. S. 1835, p. 352, 367.)
2. A party cannot give parol evidence of the existence and contents of a judgment rendered by a justice of the peace, without first proving its loss or destruction. Secondary evidence of a record is inadmissible, unless its loss or destruction be first proved.

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APPEAL from Davies Circuit Court.

STRINGFELLOW, for Appellants.

1. The securities are not liable unless the officer acted officially.
2. There is no authority vested in a constable to receive or collect money officially, unless there be a judgment. He may then receive the money without an execution; and his securities will be liable.—Stat. Mo., 367.
3. Parcel evidence of an execution or judgment can never be given, until their loss is shown. Authorities are deemed unnecessary on this point.
4. The instructions asked by appellant ought to have been given.

EDWARDS, for Appellee.

1. Where a debt is put into the hands of a constable, and collected by him by virtue of his office, he and his securities are liable, on his official bond, for the amount collected; and the plaintiff is not bound to prove that the money was collected on a judgment or execution.
2. To prove that money collected by a constable was collected upon a judgment or execution, it is not necessary to produce a transcript of the judgment; but the fact is sufficiently proved by proof that a summons was served on the defendant; and that the constable afterwards called upon him with an execution, upon which the amount was paid.—Cowen & Hill's notes to Phil. Ev., part 1, 554; 13 Wend., 35.
3. That if the Circuit Court erred, it was against the plaintiff, (appellee,) in rendering judgment for the amount collected only, and not for the same, with interest thereon at the rate of 100 per cent. per annum from the time the money ought to have been paid.—Rev. Stat., p. 368, sec. 22, 23.

TOMPKINS, Judge, delivered the opinion of the Court.

Samuel Bogart instituted his suit, before a justice, of the peace, against John W. Bush, a constable, and William S. Green, Jacob Rogers, and G. Worthington, securities of said Bush, on his official bond. The summons was served on Green and Rogers, who appeared and defended. The judgment being given against them, they appealed to the Circuit Court.

In that court, Bogart gave in evidence the official bond of Bush; and proved by a witness, that some time in the summer of the year 1839, Bogart put a note into the hands of one Conner to be sued on; the note was made by one Wilhite, brother to the witness: witness said Conner caused suit to be brought on this note; and that Bush came to Wilhite, the maker of the note, and served a summons on him; afterwards, Bush again came to Wilhite with an execution, which the witness said he saw, and that Wilhite paid Bush eight dollars, the amount of the execution. The witness further states, that he knew that Bush had a summons

against Wilhite on the note above mentioned, by the admission of Bush. The defendants objected to this testimony, and the court overruling their objection, they excepted to the decision of the court. Several instructions were given by the court, to which exceptions were taken by the defendants. The Circuit Court also gave judgment for the plaintiff; and the defendants appeal to this Court.

The plaintiff, Bogart, to sustain the judgment of the Circuit Court, makes these points:—

1st. Where a demand is put into the hands of the constable, and collected by him by virtue of his office, he and his securities are liable on his official bond for the amount collected on judgment or execution.

2d. To prove that the money was collected on a judgment or execution, it is not necessary to produce a transcript of the judgment; but it is sufficient to prove that a summons was served on the defendant; and that the constable afterwards called upon him with an execution, upon which he paid the amount.

1. The constable gives bond, conditioned, that he will execute all process to him directed and delivered, and pay all money by him received upon the same. — Second section of the act concerning constables, p. 116, of the Digest of 1835. The act concerning justices' courts directs, that at any time after the commencement of suit, the defendant may pay to the constable the full amount of the claim and costs, &c.; (twenty-first section of second article, p. 352;) and by the eighteenth section of seventh article of the same act, p. 367, the constable is required to receive all money that may be tendered to him in payment of any judgment obtained before a justice of the peace, &c. The language of the first point, then, is exceptionable in assuming, that a constable may receive evidences of debt for collection, "by virtue of his office," and his securities cannot be made liable for any money he may receive on notes, &c., given him for collection, unless it be after process to him directed and delivered.

2. In support of his second point, the appellee relies on the notes to Phillips' Evidence, p. 554, where it is said, that if it be proved that A. acted as a justice of the peace, it is evidence as primary proof of his official character, though the writ issued by him was not produced.

That is all very true, but here is no dispute whether Bush was constable: that not being denied, it is supposed to be admitted; but the true question is, whether there was a judgment given by the justice. The proper evidence is the transcript of the justice's docket. The witness says, Bush told him he had a summons for the defendant, Wilhite; and that afterwards, he saw Bush have an execution. This evidence is too loose to supply the place of the justice's transcript. The law admits no secondary evidence to supply a record that is not proved to be lost. The witness might be mistaken; he might wilfully misrepresent. The appellee is more unfortunate in his second authority. (13 Wendall, 35.) In that case, the declaration was against the defendants, as representatives of the late sheriff of Niagara county, and it set out a judgment in favor of the plaintiff, the issuing of an execution, and the delivery of the same to the late sheriff; and on the trial of the cause, the exemplification of the record was produced in evidence; the issuing of the execution, its delivery to the sheriff, and his admission shortly after, that

Bogart vs. Green and Rogers — Stollings vs. Sappington.

he had collected the money, were duly proved. We are not at liberty to presume that matter in *pais* was here admitted to prove any thing but the delivery of the execution to the sheriff, and the admission that he had collected the money. But in the case before the court, the issuing of the summons is proved by the admissions of Bush, and we are left to presume, from the verbal statement of the witness, that he saw an execution. The citation from Phillips' Evidence is not in point, and the case from Wendall proves that the justice's transcript ought to have been produced, to show a judgment for the plaintiff, and an execution issued thereon. After that, the payment of the money by the defendant, Wilhite, might have been proved. Without such proof, the securities of Bush were not liable in this action, on his official bond. The judgment of the Circuit Court is reversed, and the cause remanded.

STOLLINGS vs. SAPPINGTON.

1. A party cannot recover in general *indebitatus assumpsit*, where there is an express contract, not rescinded or executed.
2. Where there is an open and subsisting agreement, a party is not at liberty to waive his contract, or convert it into a general *indebitatus assumpsit*. Therefore, where the defendant received property of the plaintiff under a special agreement to sell the same, and account to the plaintiff therefor, or to return that part unsold, on application at the house of defendant, on or before a certain time, it was held, that the plaintiff could not waive the special agreement and sue in general *indebitatus assumpsit*, and that the defendant was not liable until a demand made according to the terms of the agreement.

APPEAL from Davies Circuit Court.

EDWARDS, for Appellant.

1. The defendant sustained the character of bailee, and could not be held liable on the common counts.—1 Tomlins' Law Dic., 532; 1 Chitty's Plead., 373, 379.
2. The common counts will only lie where the contract is executed, and nothing remains to be done but the payment of the money, and where the special contract remains unperformed, even by default of the defendant, the declaration must be special.—1 Sand. Plead. and Ev., 67.
3. By the express terms of the instrument in evidence, the defendant could only be liable for the pills, not sold after demand made at the house of defendant, and no demand was proved.
4. Was the defendant bound to greater diligence in the custody of the pills than in that of his own property.—1 Sand. Plead. and Ev., 67, 132; 5 Mo. Rep., 97.

DUNN, for Appellee.

1. The time and place of payment of the money, or delivery of the medicine, being fixed by the instrument sued on, no demand by the plaintiff of the defendant was necessary, and it was incumbent on the defendant to show that he was ready and willing to pay the money, or deliver the medicine, according to the terms of the contract.—*Cornelius vs. McDonald*, 2 Mo. Rep., 56; *Martin vs. Chauvin*, 7 Mo. Rep., 280.

2. After the time of payment had elapsed, the instrument sued on imposed the same obligation upon the defendant as a promissory note, and as such it was properly admitted in evidence under the common counts.—2 Starkie's Ev., 302.

NAPTON, Judge, delivered the opinion of the Court.

This was an action of *assumpsit*. The declaration contained four counts, to wit: "for money had and received; goods sold and delivered; for interest; and an account stated."

Plaintiff had judgment for \$288.

On the trial, the plaintiff relied on the following paper:—

"State of Missouri—County of Ray.

"Received of Dr. John Sappington, of Saline county, Mo., by the hands of R. Hawpe, three hundred boxes of medicine, at one dollar and fifty cents each, amounting to the sum of four hundred and fifty dollars, which I promise to sell, and account to him therefor, or return those not sold on application at my house, on or before the first day of next January, subject to a deduction of twenty per cent. for my services in selling.—Given under my hand, this 28th May, 1838.

"JACOB STOLLINGS."

There was no proof of any application by plaintiff at defendant's house.

It is well settled, that a plaintiff cannot recover in general *indebitatus assumpsit*, where there is an express contract, not rescinded or executed.—1 Chitty's Plead., 133, and 2 Tuck. Com., 133; 11 John. Rep., 438.

Where there is an open and subsisting agreement, a party is not at liberty to waive his contract, or convert it into a general *indebitatus assumpsit*.

The defendant, by the terms of his agreement with the plaintiff, was at liberty to return the medicine, or its stipulated value, and he was in no event responsible until a demand was made.

The judgment of the Circuit Court will be reversed, and the cause remanded.

Offutt vs. John (a mulatto).

OFFUTT vs. JOHN (A MULATTO).

Where a judgment is given in evidence, it is equally conclusive in its effect, as if it were specially pleaded in bar.

APPEAL from the Ray Circuit Court.

EDWARDS, for Appellant.

1. That hearsay is competent original evidence only, where the fact sought to be proved, from its nature absolutely, or at least usually, excludes proof by direct evidence; as in questions of relationship, character, prescription, pedigree, and the like.—1 Starkie's Ev., 30; Peake's Ev., 22. And the tests of its admissibility are—

1st. That the fact to be proved be of a public nature.—1 Starkie's Ev., 33, 43.

2d. That neither reputation, nor traditionary declarations, are admissible to prove a particular fact.—1 Starkie's Ev., 34; Outram vs. Morewood, 3 East; 2 Peters' Digest, 224.

To warrant the admission of hearsay as secondary evidence, it is necessary, among other things, in addition to the above tests, to lay a foundation:

1st. By showing that the superior evidence, in place of which the secondary is offered, is no longer attainable, as by showing the death of the person who made the declarations.—1 Starkie's Ev., 158, 9.

2d. Declarations as to pedigree are not admissible, unless derived from persons connected with the family.—1 Starkie's Ev., 43; Peake's Ev., 22; Jackson vs. Browner, 18 Johns. Rep., 37.

3d. The declarations must be free from suspicion, and not made *post litem motam*.—1 Starkie's Ev., 44, and note.

4th. The circumstances which warrant the admission of hearsay as secondary evidence must first be proved.—1 Starkie's Ev., 159.

2. The record of the suit between Love, the reputed mother of the appellee, and Robert Walker, from the Montgomery Circuit Court, in the State of Kentucky, is not admissible in evidence in this suit.

1st. It is *res inter alios acta*.—1 Starkie's Ev., 58, 120, 214, 217, 220; Dale and Others, Executors, vs. Rosevelt, 1 Paige, 13; and, particularly, Davis vs. Wood, 1 Wheaton, 6.

2d. The record does not disclose the facts on which she was adjudged free, and her right of freedom may have accrued subsequent to the birth of the appellee. Walker may have had no title, and yet she may have been the rightful slave of another.—2 Johns. Rep., 24; 1 Starkie's Ev., 217, 221, 222, 224.

3d. Is not the record defective, showing that exceptions were had which no where appear? Does it appear that the suit was ever prosecuted to a final determination?

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3. Were the copies of depositions, included in the transcript of Logan Circuit Court record, admissible in evidence, the deponents having been proved to be dead?—1 Starkie's Ev., 43, 264, 267; Peake's Ev., 89, note; 15 Johns. Rep., 539; 11 Johns. Rep., 446.

The only question which can arise is, whether they are sufficiently authenticated by the certificate of the clerk? (1 Starkie's Ev., 167, 178.) In *Chirae vs. Reinecker*, 2 Peters' Rep., 613, depositions had been taken in France; they were lost, and in a subsequent suit, the bill of exceptions taken at the former trial, and containing the depositions, were allowed to be read in evidence.

4. It never was the settled common law doctrine, that to render a former verdict and judgment conclusive between the parties, it must be pleaded by way of estoppel. The weight of authority in England is clearly against the doctrine, at least, in all suits which do not require special pleading, as in *assumpsit*. In the United States, the general doctrine clearly is, that a verdict and judgment between the parties is conclusive, and equally conclusive whether pleaded or given in evidence under the general issue, in cases where it is admissible under that issue.—19 Johns. Rep., 162; 7 Cranch, 481; 3 Wheaton, 238; 6 Wend., 447.

Opposed to the doctrine contended for by the appellee are, in England, the cases of *Hitchen vs. Campbell*, 2 Black., 827; 3 Wills, 304, S. C.; *Budd vs. Randall*, 3 Burr., 1035; and *Scott vs. Shuman*, 2 Black., 977. See also Peake's Ev., 63, 64.

It is singular that, in the case of *Evelin vs. Haynes*, 3 East, 36, and *Miles vs. Rose*, 5 Taunt., 705—regarded as leading cases—the former judgment and verdict could not have been conclusive if pleaded, being cases in which verdict had been given on the general issue, in an action on the case, where the right was never pointedly put in issue.

In Virginia, Maryland, Tennessee, Pennsylvania, New York, and other states, the doctrine has been expressly rejected.—See *Shelton vs. Barbour*, 2 Wash., 64; *Preston vs. Hervey*, 2 Hen. and Munf., 55; *Edwards vs. McConnell*, 1 Cooke's Rep., 305; 3 Cowen, 120; 4 Cowen, 559; 3 Wend. Rep., 27; 10 Wend., 84; 14 Mass. Rep., 241; 17 Mass. Rep., 365.

The United States Supreme Court have, on several occasions, recognized and acted upon the same doctrine.—See *The United States vs. Nourse*, 9 Peters' Rep., 8; and *Young et al. vs. Black*, 7 Cranch, 565.

In Missouri the question is no longer open. *McNight vs. Taylor*, 1 Mo. Rep., 282, was an action of *assumpsit* brought on a promissory note; plea, *non-assumpsit*. The defendant gave in evidence, under that issue, a former judgment, on the same subject-matter, in his favor: held by the court to be a bar.

Penrose vs. Greene, 1 Mo. Rep., 774, was an action of *replevin*; plea, *non-detinet*: a former verdict and judgment were given in evidence; held to be conclusive.

La Joy vs. Primm, 3 Mo. Rep., 529, recognizes the same general doctrine.

5. According to the authority of Chitty and Starkie, relied on by the counsel for the appellee, such verdict is *pregnant evidence* and argument, before the jury, of the fact in dispute. But the court, in the case at the bar, refused to instruct the jury that it was even *prima facie* evidence.—Chitty's Contr., 301; 1 Starkie, 228.

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6. Was it not the intention of the legislature, in authorizing the admission of special matter under the general issue, in suits for freedom, to give such matter as conclusive a character as if pleaded specially? The case stands on the same ground as that of constables, justices of the peace, and other public officers sued for misconduct, who are allowed by statute to plead the general issue, and give special matter in evidence.—See Sand. Plead. and Ev., 96, 691; 3 Camp., 378; 1 Chitty's Plead., 541.

7. If such verdict and judgment is not conclusive against a petitioner for freedom, neither can it be conclusive for him. A colored person liberated from servitude on one day, may be seized by his oppressor the next, and, if not protected by the verdict and judgment, may be again enslaved.

8. The verdict and judgment, read in evidence by the defendant, is conclusive of the rights of the parties, until the plaintiff shows that his right to freedom has accrued subsequent to the rendition of said judgment. In this case the plaintiff predicates his claim solely on the ground that his mother was a *white woman*.—4 Randolph, 134; and, particularly, *Shelton vs. Barbour*, 2 Wash., 64, before cited. See also the whole doctrine, as to the effect of a former verdict and judgment between the parties, ably examined in Cowen and Hill's notes to Phillips' Evidence, part 2, p. 804.

9. Does the verdict authorize the judgment?

DUNN, for Appellee.

1. Reputation is evidence to prove a pedigree, including the state of the family, as far as regards the relationship of its different members, their births, marriages, and deaths.—See 1 Starkie's Ev., 32; 8 Johns. Rep., 128; 10 East's Rep., 120, 4 Camp., 401.

2. The record of the case of Love (the mother of the plaintiff) *vs. Walker*, is admissible in evidence as an introductory fact to a link in the chain of the plaintiff's title to freedom, and as that fact might be proved by general reputation, it may be established by a judgment between different parties.—See 4 Wheat. Rep., —; 1 Stark. Ev., 251; 1 Martin and Yerger's Tenn. Rep., 1; 1 East's Rep., 355.

3. That part of the transcript in the case of John *vs. Elsly Offutt*, in which the clerk of the Logan Circuit Court states what purports to be copies of depositions read on the trial, not being in the bill of exceptions in that case, and being a part of the record, was properly excluded by the Court.—See 4 Mo. Rep., 626; 5 Mo. Rep., 110; 6 Mo. Rep., 162; 1 Bibb Rep., 266; and Rev. Stat., 220.

4. The verdict and judgment in that case may have been obtained upon the evidence of the present defendant, and this ought to have excluded the whole record, together with the pretended copies of depositions.—1 Starkie's Ev., 220, 266.

5. The present defendant would not have been prejudiced by a contrary verdict and judgment in the case of John *vs. Elsley Offutt*, and he cannot now be permitted to derive the benefit of it. The prejudice and benefit must be mutual.—1 Starkie's Ev., 220.

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6. The course of action in the case of *John vs. Esly Offutt* was different from that in the present case: consequently, the former judgment is no bar.—4 Day's Rep., 431; 3 Wend. Rep., 31; 1 Starkie's Ev., 221; 2 Johns. Rep., 24.

7. The defendant, having pleaded not guilty, whereby elected to submit his case to the jury, and the former judgment would only have been conclusive, if pleaded in bar to the action, by way of estoppel.—3 East's Rep., 346; 2 Barn. and Ald., 668; 1 Chitty's Plead., 512, note (c.); *Ibid.*, 548, 549, 635; 1 Starkie's Ev., 226, 227; 4 Day's Cases in Error, 274; 6 Rand. Rep., 86, 94; 2 Blackf. Rep., 465; 3 Wend. Rep., 27; 2 John. Rep., 24; 2 Digest N.Y. Rep., 865, 866; 8 Wend. Rep., 9; 7 Johns. Rep., 20.

8. The legislative intention must be expressed with irresistible clearness, to induce a court to suppose a design to overthrow a fundamental principle.—1 Cond. Rep., S. C. U. S., 229, 431; 2 Cranch Rep., 358.

9. The admission of evidence out of the usual course of practice, is a matter of discretion with the court, and is no error; more especially as the evidence admitted was not necessary.—4 Mo. Rep., 360; 7 Mo. Rep., 115; 1 Starkie's Ev., 180.

10. Where there is a contrariety of evidence, the court will not grant a new trial, unless the evidence strongly preponderates in favor of the party seeking a reversal of the judgment.—1 Starkie's Ev., 470; 4 Mo. Rep., 295; 6 Mo. Rep., 61.

NAPTON, Judge, delivered the opinion of the Court.

This was an action brought by the appellee to establish his freedom, under the provisions of our statute regulating the mode of proceeding in such cases. The defendant pleaded the general issue, and offered in evidence the record of a suit for freedom, in the Circuit Court of Logan county, Kentucky, between the appellee and one Eli Offutt, from which it appeared that a verdict and judgment was had against the appellee. The appellant purchased the appellee from said Eli Offutt.

The court instructed the jury that this was *persuasive* evidence of the facts therein, but not conclusive; and that the defendant having elected to submit his cause to the jury, under the general issue, the jury were therefore to give their verdict upon the whole evidence; and they were not to try whether the plaintiff was estopped from trying the question, but whether the defendant was guilty of the wrongful act imputed to him.

There was much other testimony in the case, and several questions raised in relation thereto, and discussed by the counsel; but as we think the instruction given, as above set forth, disposes of the whole case, it becomes unnecessary to investigate the other points in the case. The verdict and judgment were for the plaintiff in the Circuit Court.

No principle of law is better settled than that a judgment of a court of competent jurisdiction is binding upon the parties to that judgment, and their privies, so long as it remains unreversed. It is expedient to the peace of society, that there should be an end to litigation, and this would not be, if parties were at liberty to

have as many controversies about the same subject-matter as their interest or passions might dictate. Hence it is a received maxim, *nemo bis vexari pro eadem causa*.

The general principles determining the force and effect of judgments, are summarily stated in the celebrated case of the Duchess of Kingston, 1 Phil. Ev.; 321. "From the variety of cases," says Chief Justice De Grey, "relative to judgments being given in evidence in civil suits, these two deductions seem to follow: *First*, that the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties upon the same matter directly in question in another court; *Secondly*, that the judgment of a court of exclusive jurisdiction directly upon the point is, in like manner, conclusive upon the same matter coming incidentally in question in another court, between the same parties, for a different purpose.

"But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction; nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

This doctrine is, in substance, adopted by the Court of Errors in New York, as in the case of *Jackson ex dem., Genet vs. Wood*, 3 Wend., 27, 8, (*Ibid.*, 5,) a leading case on the subject in that State. The court there held, first, that the judgment of a court of concurrent jurisdiction, or one in the same court, directly on the point, is, as a plea, a bar, and as evidence in certain cases, conclusive between the same parties, upon the same matter directly in question, in another court or suit; but is no evidence of a matter which was collaterally in question, nor of matter incidentally cognizable, or to be inferred only by argument or construction from the judgment; and, second, that if it does not appear, from the record, that the verdict or judgment in the former suit were directly upon the point or matter which are again attempted to be litigated in the second action, the fact may be shown *aliunde*, provided the pleadings, in the first suit, were such as to justify the evidence of those matters, and that it also appeared, that when proved, the verdict or judgment must necessarily have involved their consideration and determination by the jury. The same principle is laid down in the case of *Lawrence vs. Hunt*, 10 Wend., 80.

Notwithstanding this principle, which has thus authoritatively been established, and in no case expressly dissented from, a distinction has been taken, both in England and several of the United States, between cases wherein the verdict and judgment have been pleaded as a bar, and those in which they have been offered in evidence. In the latter class of cases it has been held, that the verdict is not conclusive, but that the jury may find according to the fact in evidence, without being bound by such former verdict and judgment.

A succinct review of the cases on this point is made by Judge Cowen, in his valuable notes to Phillips' Treatise on Evidence, vol. 3, p. —. It is unnecessary to examine these cases at large, for they are numerous and conflicting; but as the question has been heretofore only incidentally determined by this Court, we desire to base our opinion both upon authority and reason, and therefore recur to some of the leading cases.

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It will be observed, upon an examination of these cases, that much of the diversity of opinion among the judges may be traced to a disposition to confound judgments with estoppels, and to set up a new and undefined distinction between verdicts and judgments. "An estoppel," says Blackstone, "is a special plea in bar; which happens where a man has done some act, or executed some deed, which estops or precludes him from averring any thing to the contrary." Estoppels are either matter of record, as an admission in pleading, or by deed, as a bond, the consideration of which cannot be inquired into at law; or by *pais*, as entry and acceptance of an estate, or an acceptance of rent.—2 Tuck. Comm., 258. From this definition, and these instances of estoppels, it is not to be wondered at that they are viewed in law as odious defences, inasmuch as they frequently preclude a party from showing the truth. It is equally clear that, regarding them in this light, there is but little analogy between them and judgments. The former is the act of the party, the latter is the solemn sentence of the law pronounced by a court of competent jurisdiction. The former constitute a constraint upon a personal privilege; the latter concern not only the parties to that judgment, but upon their inviolability depend the peace and security of the community. In determining the effect of a judgment, therefore, there is an obvious impropriety in regarding them merely as estoppels, and applying to them the principle governing the latter class of defences.

Some confusion is also created in the elementary books, by generally treating of verdicts and judgments as inseparable concomitants, and occasionally attempting a distinction between them, as though a verdict upon which no judgment was pronounced was, of itself, entitled to any weight. In Phillips' Evidence, p. 223, it is said, "that where a *judgment* is pleaded, it is proposed as something decisive and conclusive, as *res judicata*. When a *verdict* is offered in evidence, it is proposed on the same footing as the rest of the evidence in a cause, only as a medium of proof, and the credit due to it must depend upon the nature and circumstances of the particular case. It is merely the opinion of a former jury upon the facts there laid before them, and with reference to the strength or weakness of the proof on each side." For this opinion, no authority is cited. If the author, in speaking of the weight to which verdicts are entitled as contradistinguished from judgments, alludes to that class of cases in which verdicts are admitted as testimony or a species of hearsay evidence, on questions of pedigree, prescription, or custom, there may be some truth in the position he assumes; but it is not perceived upon what authority, or principle, a distinction is taken between verdicts and judgments, where they are upon the same point, and between the same parties, and when there can be no verdict admissible at all, unless that verdict has been ripened into a judgment. The same opinion has been adopted by the Supreme Court of Connecticut, a court which has, in several cases, sustained the position assumed by the Circuit Court of Ray county, in its instructions to the jury on the case now before the Court. In the case of *Betts vs. Starr*, (5 Conn. Rep., 550,) the court held the judgment, which was offered in evidence under the general issue, a bar, and conclusive; but the judge who delivered the opinion of the Court said, "Though verdicts must generally, if not always, be specially pleaded, when they

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are relied on as conclusive; yet a *judgment* of a court, when properly given in evidence, is as conclusive as though specially pleaded." This position appears to rest upon the authority of Buller's *Nisi Prius*, (p. 232,) who refers to the case of *Clarges and Sherwin*, (Ca. K. B., 343,) in which the only question was upon the legitimacy of the Duke of Albemarle, and the court would not suffer a former verdict between other parties, concerning other land depending on the same question and title, to be read in evidence. It is clear, that the verdict is entirely inadmissible, unless the record of the judgment founded upon it be produced; for if it happen that the judgment has been arrested, or a new trial granted, the verdict is no evidence. (Bull. N. P., 234, *Mahoney vs. Ashton*; 4 Han. and McH., 322; 2 Han. and McH., 402.) The whole amount of the doctrine, then, is, that when a verdict is offered in evidence, the whole record must be produced; and though the judgment is, in such cases, conclusive, the verdict is not held to be equally so, either because it embraces a finding of special facts which do not appear in the judgment, and therefore may be regarded merely as the opinion of twelve men, and as such persuasive or pregnant evidence, as it is termed, of the truth of such facts to another jury, when they again come into controversy between the same parties, or, because there is nothing on the face of the record, either in the verdict or judgment, showing the points actually decided, and therefore evidence *aliunde* must be introduced, to show what was determined; and such evidence, being by parol, must be governed by the same rules which regulate every other kind of parol testimony. If the former be the basis of the doctrine, it is confined to special verdicts; and if the latter be the foundation of this distinction between verdicts and judgments, then it is obvious that it can make no difference whether the record be pleaded specially, or offered in evidence. In either event, it cannot of itself be conclusive.

Goddard's case (2 Co. Rep., 4,) is one of the earliest cases relied on to sustain this distinction between the effect of the judgments, when offered in evidence, and when specially pleaded. That was an action on a bond given to a deceased intestate; and the defendant pleaded, that the intestate died before the date of the bond, and so concluded that the writing was not his deed, on which issue was taken, and it was held, that the jury were not estopped from finding the bond was executed nine months before it bore date, and in the life-time of the intestate. (Bull. N. P., 298.) There seems to be nothing in this case to warrant the conclusions which have been drawn from it. In *Trevivian vs. Lawrence*, (1 Sul. Rep., 276,) it was held, that a party, by neglecting to plead an estoppel when he may, thereby consents to waive the same, and submits the whole controversy to the jury, on its merits. Upon this case rests the celebrated cases of *Vooght vs. Winch* (2 B. and A., 662,) and *Outram vs. Morewood*, (3 East., 346,) and yet it is clear, that the principle settled in that case could have no application to cases where special pleading was not required. It cannot apply to actions of assumpsit, and other actions, where matters in bar may be given in evidence under the general issue; for in such actions there is no obligation on a party to plead, and the failure to plead specially cannot, by being regarded as neglect, be construed into a waiver by consent.

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In the case of *Vooght vs. Winch*, it was well remarked by Judge Cowen, (3 Phil. Ev., p.—,) the judgment offered in evidence would not have been conclusive had it been specially pleaded, and, therefore, all that the court says in relation to the mode of its introduction was outside of the case.

In the United States, the decisions on this point have not been uniform. In Pennsylvania, the courts have confined the principle held in *Outram vs. Morewood* to cases where special pleading is required, and holding, that in actions of assumpsit the record of the former recovery is conclusive, "binding the parties, the court, and the jury."—*Kilheffer vs. Herr*, 17 Serg. and Rawle, 319; *Cist vs. Zeigler*, 16 S. and R., 282; *Marsh vs. Pier*, 4 Rawle, 273.

In Massachusetts, the question has turned upon the principle of special pleading, and there is nothing in the decisions of the court of that State to sustain the broad doctrine assumed in the instructions of the Circuit Court. In *Howard vs. Mitchell*, (14 Mass. Rep., 241,) the defendant, in trespass, pleaded in abatement, that one H. was co-tenant with plaintiff, upon which issue was joined. At the trial, plaintiff claimed that the defendant was estopped from showing the truth of his plea, because of a former judgment, whereby the contrary was established; but the court held, that the plaintiff should have replied such judgment specially, and failing to do so, the defendant was not estopped.—The same principle was decided in *Adams vs. Barnes*, 17 Mass. Rep., 365.

In *Church vs. Leavenworth*, (4 Day's Ca. Er., 277,) Judge Swift, of Connecticut, delivering the opinion of the court, adopts the doctrine of Lord Ellenborough, in *Outram vs. Morewood*, that verdicts are never conclusive unless specially pleaded. The opinion of this eminent jurist is entitled to great respect; yet it is worthy of observation, that his opinion on this point seemed nowise necessary to the decision of the case; for it appeared, from his statement, that the same point was not in issue in the two cases, and on this ground alone the case could have been decided. Judge Baldwin, who dissented, lays down the law as decided in the *Duchess of Kingston's* case.

In Virginia, the weight of authority is in opposition to the doctrine of *Outram vs. Morewood*. The cases of *Shelton vs. Barbour* (2 Wash., 64,) and *Preston vs. Hervey*, (2 H. and M., 55,) are decisive on this point; nor can it be considered as at all unsettled by the doctrine of Judge Carr, in *Cleaton vs. Chambliss*, (6 Rawle, 94.) In that case the court held, that the cause of action was not the same, and therefore, whether plead in bar or given in evidence, was not conclusive.

The case of *Young vs. Black* (7 Cranch, 566,) was an action of assumpsit; and a former judgment, given in evidence under the general issue, was held by the court to be conclusive. The same point was determined in the case of the *United States vs. Nourse* (9 Peters, 8).

The case of *McNight vs. Taylor*, (1 Mo. Rep., 282,) though the point was not expressly made, shows in what light this court has heretofore viewed this subject. That was an action of assumpsit; plea, non-assumpsit: and under this issue, the defendant gave, in evidence, a judgment. The court held, that the record of a former suit, being for the same cause of action, between the same parties, and

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necessarily supported by the same proof, was a bar. The same doctrine was held in *Penrose vs. Green*, (*Ibid.*, 774.)

Such being the contrariety of the decisions on this point, it is evident, that there is no such preponderance of authority as to induce this Court to decline adopting that doctrine which appears to be better supported by reason, sounder in principle, and safer in practice. It is difficult to assign any reason why the weight and value of testimony should depend on the mode in which it gets before the jury. If a judgment were to be regarded as a mere estoppel, we can perceive good reasons for saying that such estoppel, being a mere personal privilege, may be waived by the consent or negligence of the party. The judgments of courts must rest on different grounds. It is not merely for the convenience of the parties, but for the interest and peace of society, that they are regarded as binding and conclusive.

In the present case, the action in the Logan Circuit Court was between the assignee of the present defendant, and the plaintiff: and the jury, it appears by the record, found the fact which is now in issue between these parties; and the judgment of the court was, that John, the plaintiff, was a slave.

The instruction of the court below, which allowed the jury to disregard this judgment, was, in our opinion, erroneous. The judgment is reversed, and the cause remanded, to be proceeded with in conformity with this opinion.

FIELDS vs. HUNTER.

1. Where a declaration is founded upon an instrument of writing charged to have been executed by the other party, and the execution thereof is not denied by plea *verified by affidavit*, it may be read in evidence without proof of its execution.—R. S. 1835, title, "Practice at Law," art. 4, sec. 18, p. 463.
2. Where a declaration in covenant averred that the covenant was made at the county of Ray, and the covenant offered in evidence was dated at the county of Platte, the variance was held fatal.
3. Where an objection was made to the introduction of evidence, the bill of exceptions should state the specific grounds upon which the objection was made; for unless the party points out specific objections in the Circuit Court, and the bill of exceptions shows what those objections were, the case may be decided on one point by the Circuit Court, and reversed on another by the Supreme Court.—R. S. 1835, title, "Practice in the Supreme Court," sec. 31, p. 522.
4. In an action on a covenant to warrant and defend unto the plaintiff a certain tract of land sold to him by defendant, the former offered in evidence a transcript of the proceedings in an action of forcible entry and detainer, brought before a justice of the peace by plaintiff against one F., in which F. got a judgment for one-half of the land. Defendant was no party to this suit, and had no notice of the proceeding.

Held: That the record of the judgment before the justice was evidence of an eviction, but could not establish that such eviction was by title paramount.

APPEAL from the Ray Circuit Court.

DUNN, WILSON, and REES, for *Appellant*.

1. The court erred in sustaining the demurrer to the third plea; time, by way of description of record, is not material.—*Martin vs. Miller*, 3 Mo. Rep., 135; *Brooks vs. Remis*, 8 Johns. Rep., 455.

2. The court erred in permitting to be read the covenant sued on, without proof of its execution; the covenant is but the inducement to the action, and matter of fact (*i. e.*, sanction by paramount title,) the foundation.—See 1 Chitty's Plead., 517; 2 Starkie's Ev., 247; and also, for variance between the covenant sued on, and the covenant introduced as evidence, 1 Chitty, 240; 1 Cow. Rep., 177; 13 J. Rep., 450.

3. The court erred in permitting to be read as evidence the transcript of Justice Brook, and also in refusing the second and tenth instructions asked by the defendant, all of which involve the same principle. The plaintiff must aver and prove that he was evicted by a lawful title existing at the time of the covenant.—See 2 Starkie's Ev., 248; 7 Wend. Rep., 281; 5 J. Rep., 120.

4. The court erred in giving the plaintiff's instructions, and in refusing to give the defendant's third, fourth, eighth, and ninth instructions, which errors are embraced by the same principle. The defendant was not affected in any manner in this suit, by the trial before the justice, having no notice of such proceeding, nor did such trial preclude him from showing, on this trial, that his title, at the time of making the covenant, was better than Foster's, by whom, it is alleged, the plaintiff was ousted. But, on the contrary, the plaintiff, by failing to notify the defendant of the proceeding before the justice, took upon himself the onus of showing upon this trial that Foster's title was lawful, and paramount to that of the defendant, existing at the time of the making of the covenant.—See 15 Wend. Rep., 425.

5. The court erred in refusing the defendant's fifth instruction.—See *Greenby vs. Wilcox*, 2 J. Rep., 1; *Folliad vs. Wallace*, *Ibid.*, 395; *Kent vs. Welch*, 7 J. Rep., 258, *Ibid.*, 376; *Vanderkan vs. Vanderkan*, 11 J. Rep., 122; 7 Wend. Rep., 281, and 2 Sugden's Vendors, 94.

DONIPHAN and WOOD, for *Appellee*.

1. That the third plea of appellant was bad, and the demurrer properly sustained.

2. That the Circuit Court properly admitted the covenant sued on, without proof of its execution, being the foundation of the action, and profert being made.

3. That the judgment against the appellee, on the action by forcible entry and detainer, amounts to a disturbance of the possession, and an eviction in law, under the circumstances of this case, and the transcript was properly admitted as evidence.

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4. That if it be competent, under the first breach assigned, for the appellee to prove his efforts to get the possession of the claim of land sold him by appellant, and he failed, the transcript was competent evidence to show that fact.

6. That the court did not err in refusing to permit appellant to prove what other lands Foster claimed or possessed, except the land interfering with the claim sold to the appellee.

7. That notice from appellee to appellant, of the pendency of the proceeding by forcible entry, was not necessary to enable the appellant to recover, under the circumstances of this cause.

8. That the first and sixth instructions prayed for by appellant, were all that the court could give on the evidence, and the others were properly refused.

9. That, independent of the transcript of Justice Brook, there was, on the trial, sufficient evidence to prove the possession of Foster of the *eighty* in dispute, and, from all the circumstances of the case, the verdict of the jury was right, and this Court will not therefore reverse.

NAPTON, Judge, delivered the opinion of the Court.

This was an action of covenant, brought by Hunter against Fields, in the Circuit Court of Ray county.

The declaration charged, that whereas heretofore, to wit, on, &c., at the county of Ray aforesaid, the defendant had, by a certain instrument of writing, sealed, &c., bargained and sold to the plaintiff the land on which he then lived, containing one hundred and sixty acres, for the sum of three hundred dollars, and had covenanted to warrant and defend unto the plaintiff the above-named land; said defendant did not and could not warrant and defend said tract of land, but on the contrary, at the time of making said writing, had no title, interest, or claim whatever to the land.

It was farther averred, that one Foster, who, at the time of making said covenant, and ever since, had a good and valid title to the possession of said tract, had entered into the possession of the same, and ejected the said plaintiff by due process of law.

The defendant pleaded *non est factum*, without affidavit, covenants performed, and former recovery. To this plea, a demurrer was filed, but the record does not show any disposition of the demurrer. The parties went to trial on the two first pleas, upon which issue had been taken, and a verdict and judgment was rendered for plaintiff. Motions were made in arrest of judgment and for a new trial, but the motions were overruled.

It appears, from the bill of exceptions, that the plaintiffs offered, in evidence, a covenant, which was dated Platte county, to the reading of which the defendant objected, but the same was admitted in evidence, without proof of its execution. The plaintiff also gave in evidence a transcript of the proceedings, in an action of forcible entry and detainer, brought before a justice of the peace by plaintiff, against Andrew Foster, in which suit Foster got a judgment for one-half the land purchased by plaintiff from Fields. Parol evidence was introduced to identify the

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land; it was also in evidence, that Fields had no notice of this proceeding before the justice; that Foster, at the time of the sale from Fields to Hunter, claimed the piece which he ultimately recovered; that a part of his improvement was on it, but that his house was on an adjoining tract. He was proved to have been an older settler than Fields; and after the purchase of Hunter, he moved his house on the tract sold by Fields to Hunter.

On this state of facts, a variety of instructions were asked for on both sides, some of which were given, and some refused. The instruction given by the court, at the instance of Hunter, embraces every thing material to be noticed here. That instruction was, that "if the jury believe, from the evidence, that any part of the claim of land sold by defendant to the plaintiff, as set out in the covenant between the parties, was in controversy in the action of forcible entry and detainer in proof, in which the plaintiff was the plaintiff and Andrew Foster was defendant, and that in that action such part of the said land so sold was adjudged to be Foster's, then they must find for the plaintiff damages to the extent of the claim of land so recovered in said action of forcible entry and detainer by said Foster."

The record presents but three points for the consideration of this Court: *First*, the proof of the covenant; *second*, the variance between the declaration and the instrument offered in proof; and, *third*, the instructions of the court.

The question raised and argued by the counsel in relation to the action of the court in the demurrer to the third plea, is not presented by the record.

1. It is provided by the statute of this state, that when a declaration is founded upon any instrument of writing charged to have been executed by the other party, and not alleged therein to be lost or destroyed, such instrument shall be received in evidence, unless the party charged to have executed the same deny the execution thereof by plea, verified by affidavit. The plea of *non est factum* in this case was not verified by affidavit, and the Circuit Court committed no error in admitting the covenant in evidence without proof of its execution.

2. The covenant offered in evidence was dated at the *county of Platte*, whereas the declaration averred it to have been made at the *county of Ray*. In the case of *Fatrigas vs. Mostyn*, (Cowp., 176,) Lord Mansfield said, "If a declaration state a specialty to have been made at Westminster, in Middlesex, and on producing the deed it bears date in Bengal, the action is gone, because it is such a variance between the deed and the declaration as makes it appear to be a different instrument." So, in *Alder vs. Griner*, the court intimated that they felt themselves bound by the authority of the case of *Fatrigas vs. Mostyn*, where the venue was in the body of the declaration.—13 Johns. Rep., 450. There was, therefore, a variance between the instrument offered in evidence and the one declared on, and the Circuit Court should have excluded it. But whether the objection be available to the party here is more questionable. It does not appear, from the bill of exceptions, that any objections to the instrument, on any specific ground, were made in the Circuit Court, and this Court has heretofore intimated its views of the spirit of the rule prescribed by the Legislature, that only such points shall be reviewed here as were decided on by the court below. It is manifest, that unless

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the party points out specific objections in the Circuit Court, and the bill of exceptions shows what these objections were, the case may be decided on one point by the Circuit Court, and reversed by another by the Appellate Court.—*Dickey and Others vs. Malachi*, 6 Mo. Rep., 186; *Frost vs. Pryor*, 7 Mo. Rep., 316; *Watson's Executor vs. McLaren*, 19 Wend., 550.

3. The record of the judgment in the action of forcible entry and detainer, before the justice, was evidence of an eviction, but could not establish that such eviction was by title paramount. The defendant was no party to that record, and had no notice of the proceedings.—*Booker vs. Bell*, 3 Bibb, 175; *Prewitt vs. Kenton*, *Ibid.*, 280; *Somerville's Executors vs. Hamilton*, 4 Wheat. Rep., 230; *Stevens vs. Jack.*, 3 Yerger's Rep., 403.

The court erred, therefore, in the instruction given at the instance of the plaintiff, and for this reason its judgment must be reversed, and the cause will be remanded.

SISK vs. CUNNINGHAM.

Where a person contracts for the service of another for an indefinite time, the contract to be terminated at the pleasure of either party, and the servant to be furnished with suitable clothing, &c.: If the employer fails to furnish the servant with such clothing, and the latter leaves his service in consequence thereof, the servant is entitled to recover as much as his services were worth.

APPEAL from Randolph Circuit Court.

VAN ARSDALL and HICKMAN, for Appellants.

1. There is no evidence that Sisk, the appellee, ever took Martha, the appellee, into his employment, under a contract, express or implied, to pay her wages if she saw proper to leave his employ in a few months.

2. The contract, proved by the evidence of Rebecca Cunningham, that existed between the appellee and appellant, shows that the engagement was for a term of years, and made to depend on some certain contingencies, such as the satisfaction of the appellant, Sisk, and his family, with the said Martha, the appellee; and if the parties were satisfied, &c., then Sisk agreed that if she continued with him or his family until she got married, or became of age, he, during the time she staid with him, would furnish her clothing &c., and at the full expiration of the term, give her a bed, &c.

3. There is no other contract proved in this cause, nor is there any evidence by which a contract can be implied different from the one proved by the said Rebecca; and her evidence, that she had bought clothing, and that Sisk refused

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to pay for them, shows no refusal on his part by which she, Rebecca, would have the right to take Martha out of the employ of Sisk, and recover monthly wages. — *Muldrow vs. Tappan*, 6 Mo. Rep., 276; *Christy vs. Price*, 7 Mo. Rep., 430; and *Posey vs. Garth*, 7 Mo. Rep., 94.

NAPTON, Judge, delivered the opinion of the Court.

This was an action brought by the defendant in error against Sisk, before a justice of the peace, for work and labor done in the service of Sisk. After a verdict before the justice, in favor of the defendant in error, the case came before the Circuit Court; a new trial was had, and the plaintiff below again obtained a verdict.

It appeared in evidence on the trial, that Martha Cunningham, the plaintiff, had been placed by her aunt at the house of the defendant, to live in his family so long as they were mutually satisfied with each other, and perform such services as were customary among the females of his family, with a mutual understanding that for those services she was to be instructed by the defendant's wife in certain branches of housewifery; receive suitable clothing, food and lodging; and when she became of age, or was married, be furnished with a good bed and such other articles of household goods as would be a reasonable compensation for her services. If she married before she became of age, then she was to receive in proportion to the time she lived with defendant. It appeared, that the plaintiff lived with defendant about three months and a half; that, at the expiration of this time, the witness, (who was the aunt of the plaintiff,) discovering that the plaintiff had not been furnished with what she considered suitable clothing, purchased some for the plaintiff, and that defendant refused to pay for the same; whereupon plaintiff left the service of defendant, and brought (by her next friend) this suit, to recover the price of her services.

On this state of facts, the court instructed the jury, on the application of the plaintiff, that if the plaintiff worked for the defendant under a general contract, and the defendant failed or refused to comply with his part of the contract, the plaintiff had a right to quit his service on such failure or refusal; and the value of her services was the measure of damages. And if there was a special contract, and the defendant violated it, then the plaintiff had a right to quit, and recover the value of her work. But the court refused to instruct the jury, on the defendant's application, that, if the plaintiff was entitled to wages, and her wages were, by contract, to be paid in clothing or other property, the plaintiff was not entitled to judgment unless a demand of such clothing or other property was made, and the defendant refused to comply with such demand.

This was a contract for an indefinite time, to be terminated at the pleasure of either party, and therefore does not come within the principle laid down in *Posey vs. Garth*, (7 Mo. Rep., 94,) where it was held, that if a person retain a servant for a year, and the servant is prevented from fulfilling his contract by the fault of his employer, the servant is entitled to wages for the entire year. Here the engagement was determined by the marriage of the plaintiff, or her attaining the

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age of twenty-one years; and upon the happening of either of these events, she was entitled to be paid in certain specified articles of property. But no provision was made for a case in which the contract was dissolved by the dissatisfaction of either party: in such event, if the services were discontinued without any breach of contract on the part of the employer, the servant could not recover upon a general *quantum meruit*. But in this case, it was clearly the duty of Sisk to furnish the minor with suitable clothing; and having failed to do so, she was entitled to recover so much as her services were worth.—1 Durn. and East, 133. The special contract was at an end, and no demand or refusal was necessary.

Judgment affirmed.

LUCY (A SLAVE) vs. THE STATE.

The act of February 6, 1836, (Session Acts of 1836, '37, p. 60,) amendatory to the act of March 20th, 1835, concerning crimes and punishments, providing for the punishment of certain felonies, when committed by slaves, was not designed to alter the nature of the offence, but merely to substitute another mode of punishment, and the offence being still a felony, the name of a prosecutor is not required to be endorsed on the indictment.

ERROR from Shelby Circuit Court.

VAN ARSDALL, *for Plaintiff in Error.*

ABERNATHY, *for the State.*

NAPTON, *Judge, delivered the opinion of the Court.*

The plaintiff in error was indicted in the Shelby Circuit Court, for arson in the fourth degree, under the sixth and tenth sections of the third article of the act concerning crimes and punishments, and was convicted.

Her counsel moved in arrest of judgment, and to quash the indictment, because the name of a prosecutor was not endorsed thereon. The motion was overruled, and this is complained of as error.

The act of 1836 (Session Acts, p. 60,) provides for the punishment of certain felonies, when committed by slaves, substituting stripes for imprisonment in the penitentiary. This law relates entirely to the punishment of the offences, and was not designed to alter the nature of the offence; nor does the act profess to do so, but expressly recognizes the offences to be felonies, and therefore, not requiring the endorsement of a prosecutor.

Judgment affirmed.

Parsons, Assignee of Reed, vs. Hill, Administrator, &c.

PARSONS, ASSIGNEE OF REED, vs. HILL, ADMINISTRATOR, &c.

An administrator may set up the infancy of his intestate as a bar to a demand founded on a bond executed by the infant. Although the defence of infancy is a personal privilege, yet the administrator is the representative of his intestate, and stands in his place.

ERROR to Audrain Circuit Court.

VAN ARSDALL and HICKMAN, *for Plaintiff.*

W. J. HOWELL, *for Defendant.*

TOMPKINS, J., *delivered the opinion of the Court.*

John N. Parsons, assignee of Thomas D. Reed, filed his demand in the County Court, against Stephen Hill, administrator of Abraham Hill, deceased, for three hundred dollars. The evidence of the demand is a single bill obligatory for the said sum of money, bearing date the fourteenth day of December, 1839. The execution of the bond was proved, and as evidence that the deceased was of lawful age, and able to contract, it was proved by witnesses that he was a young man appearing to be full grown, and transacted business for himself, paid his own taxes, &c. It was proved that the consideration of the note was *morus multi-caulis trees*.

The administrator produced a witness, who testified that the deceased was born in the year 1821, and, consequently, at the date of that bond, (14th December, 1839,) was not quite nineteen years old.

Judgment in the County Court was given for the plaintiff, Parsons, and Hill, the administrator, appealed to the Circuit Court.

The record was removed from the Circuit Court of Monroe county to that of Audrain county.

The making and assignment of the instrument of writing sued on was proved, and evidence again given of the consideration, &c., as before.

The defendant introduced the testimony of several witnesses, who stated that the deceased obligor was born in the year 1821. One of them stated that he was born on the 27th day of January, 1821.

The judgment of the Circuit Court was given in favor of the administrator, appellee here. Several instructions were asked, which it may not be material to notice, particularly as no error appears to have been committed, either in giving or refusing them. Certainly, it is some evidence that a man is of lawful age when he transacts his own business, uncontrolled by his guardian, his father, or any other person whom he recognizes as his superior; but it is very slight evidence

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compared with the testimony of witnesses who swear positively that they know the age of the person against whom the demand is sought to be established, and state that he is not of lawful age.

Again, it was contended that the defence of infancy was personal, and could not be set up by the administrator. In Bingham's Law of Infancy, p. 55, it is said, the heir or executor, sued on an infant's bond, may avoid it by pleading the infancy of the obligor. The heir is privy in blood, and the executor stands exactly in his testator's place; and both avoid the instrument in respect of the estate transmitted. The administrator stands in the place of the intestate, as the executor does of the testator. It would be a thing of evil consequence if a writing obtained as this was should become more obligatory by the death of the obligor.

It was also contended, that the Circuit Court committed error in setting aside the judgment of the County Court. In the case of *Davis vs. Davis*, decided at this term, this Court said, that the appellant, if he wish to avail himself of the judgment of the County Court, ought to except to setting aside that judgment, and not go on to a trial in the Circuit Court.

The judgment of the County Court, however, was reversed for good reason, as it seems to me, and the judgment of the Circuit Court, seeming to be well sustained by the evidence given in the cause, is therefore affirmed.

ROBINSON AND McMURRY, USE OF TIERNAN, vs. SHEPARD.

A party cannot avail himself of error in the court below, in the giving or refusing of instructions, or the admission of improper evidence, unless he takes his exceptions at the proper time, and in the proper manner.

ERROR to St. Louis Court of Common Pleas.

HUDSON and HOLMES, for Plaintiffs.

1. When the plaintiffs' account was allowed by the constituted agents of the company, and a certificate of stock ordered to be issued according to agreement, the refusal of the president to sign and deliver such certificate, being the act of the company, through their agent, was a breach of the original contract between the parties, which gave the plaintiffs the right to have the amount of their demand in money.—Chit. Cont., 112.

2. The evidence given does not show a payment by a delivery of stock, and the verdict was manifestly against the weight of evidence.—Graham on new trials.

Robinson and McMurray, use of Tiernan, vs. Shepard.

3. Upon the evidence the jury could not rationally have doubted the fact that no certificate was issued and delivered to the plaintiff, and the verdict was manifestly against the second instruction of the court.

4. The stock in question never vested in Robinson and McMurray, and at the time Rene Paul commenced his suit, the indebtedness of the company to the plaintiffs was vested in, and the property of, Peter Tiernan, by virtue of the assignment to him; and all the members of the company were, in law, bound to know, Rene Paul among the rest, that such indebtedness, or even the stock, if it were the property of Robinson and McMurray before the assignment, was not liable to be levied upon under Rene Paul's execution.

PRIMM and TAYLOR, for Defendant.

The assignment of errors questions the propriety of the decision of the court overruling the motion for a new trial. In support of that decision we submit the following:—

The verdict of a jury will not be disturbed by the court, unless it appears to have been manifestly against evidence, or the weight of evidence, or unless palpable injustice has been done.—Graham on New Trials, 362, 368; 3 Mo. Rep., 464; 4 Mo. Rep., 295; 7 Mo. Rep., 229; 6 Mo. Rep., 211, 250. Nor a verdict upon conflicting testimony.—7 Mo. Rep., 292, 57.

There was no demand shown by the testimony, on the association or company, for the certificates of stock, and even if there was, and a refusal on the part of the association to issue the same, yet if the same was subsequently issued, levied upon, and sold by virtue of a writ of *feri facias* against Robinson and McMurray, and this before the commencement of this suit, such levy and sale is a good defence to this action.

The instructions of the court are fully sustained by the evidence, and if the same were not, the plaintiff in error ought not to complain, for the reason that they are most favorable to his cause.—6 Mo. Rep., 279.

The plaintiff in error is improperly in court, for the reason, that the assignment under which Tiernan claims is fraudulent and void.—6 Mo. Rep., 305.

A second new trial will not be granted, unless the party brings himself within the statute.—7 Mo. Rep., 259; 4 Mo. Rep., 86.

TOMPKINS, Judge, delivered the opinion of the Court.

William Robinson and John D. McMurray, suing to the use of Peter Tiernan, commenced their action against David Shepard, and had a judgment against him for two dollars and twelve cents, to reverse which they come by appeal, into this court.

It appears in evidence, that there was a voluntary association of persons in the city of St. Louis, calling themselves the Concert Hall Company, of which company the defendant, Shepard, was a member. The plaintiffs were mechanics in partnership, and had done some work for the said company.

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A balance of \$202 12 appeared, on the books of the company, to be due to the plaintiffs, appellants here, and they had agreed to receive in part payment, for their work and labor done, five shares in the Concert Hall building, at forty dollars each share. The appellants called a witness, who testified that the said company had a president, a secretary, and a board of trustees; that the appellants' account against the company was examined and allowed by the board of trustees to the amount aforesaid; that stock in the said company was ordered to be issued to the amount of two hundred dollars to the said appellants. The witness was at that time secretary to the company, and immediately made out the certificates of stock, but stated that Rene Paul, the president, refused to sign the certificates, alleging that the plaintiffs were indebted to him, and that he intended to stop the funds in the hands of the company for his own use.

The appellants then gave in evidence an instrument of writing, by which it appeared, that on the 5th day of February, 1840, they had assigned to Peter Tiernan, for whose use this suit was instituted, all their property, &c., for certain purposes therein mentioned.

The defendant, appellee, gave in evidence a transcript from the docket of a justice of the peace, by which it appeared, that on the 12th day of June, 1840, said Rene Paul commenced suit in said justice's court against the appellants, Robinson & McMurray, on a note made by them to him for \$90. The judgment of the justice being for the appellants, Paul appealed to the Court of Common Pleas, where he obtained a judgment, on which an execution was issued, and the stock of the appellants in the Concert Hall company was sold.

The court then, of its own accord, instructed the jury, that if they believe that the stock was not, in fact, issued and delivered to the plaintiffs, but was obtained only for the purpose of being levied, without the knowledge of the plaintiffs, and that the issuing of the stock according to contract was refused, they must find for the plaintiffs, appellants here.

A second instruction, to the same purpose, was given by the court. The appellants took no exceptions, either to the instructions given, or to the evidence in the cause. They moved for a new trial because the verdict was against evidence, and the jury found against the instructions of the court, and also because erroneous instructions were given by the court.

If the counsel of the plaintiffs had believed the instructions given by the court to be erroneous, he should have taken his exceptions; but the instructions given by the court appear to be as favorable to the plaintiffs, appellants here, as they could have been given, consistently with the evidence in the cause; and the finding of the jury, being two dollars and twelve cents for the appellants, the balance of their account against the association, called Concert Hall Company, after deducting the amount of the five shares sold under Paul's execution, is, it seems, well sustained by the evidence in the cause.

The judgment of the Court of Common Pleas is affirmed.

LAWLESS ET AL. vs. GUELBRETH.

1. Where a person *bona fide*, and for a valuable consideration, purchases slaves from one having a power of attorney from the owner to sell the slaves, the latter cannot avoid the sale on the ground that the power of attorney was fraudulently obtained from him.
2. The fact, that a subscribing witness to a writing was a person of bad character, may influence the jury in determining whether the writing was the act of the person purporting to have executed it, but cannot prevent the writing from being admitted in evidence.

APPEAL from St. Louis Circuit Court.

LAWLESS, for Appellants.

GAMBLE, for Appellee.—I make the following points:—

1. The bill of sale from Armstead to Tiffin was regularly proved by proving the hand-writing of a deceased subscribing witness, and that the other witness (who being unable to write, made his mark,) was out of the State; the grantor having also signed only by a mark.—1 Starkie, 329.

2. The subsequent evidence given by appellants, of the bad character of the subscribing witness, went to the jury, to influence their consideration of the question of fact, whether Armstead actually executed the bill of sale, and that question was left to them by the instructions of the court; this evidence did not affect the propriety of admitting the deed in evidence.

3. The appellants had all the benefit of all their evidence about fraud or imposition by the three first instructions given for the plaintiffs, and the last instruction given by the court of its own accord, except so far as they claimed to invalidate the title of defendant as a purchaser *bona fide* for valuable consideration, without notice of fraud.

4. The defendant, as such *bona fide* purchaser without notice, was entitled to hold the property against the plaintiffs, and the instruction asked by defendant and given by the court was correct.—5 T. Rep., 175, Parker vs. Patrick; 2 T. Rep., 750, Harwood vs. Smith; 15 Mass. Rep., 156, Buffington vs. Gerrish; 12 Pick. Rep., 307, Rowley vs. Bigelow; 8 Cowen, 238, Mowray vs. Walsh.

5. The court did right in refusing the fourth instruction asked by plaintiffs, for the reason, that it is not law as between Armstead and Tiffin; and, secondly, upon the authorities before cited, it is clearly not law between the plaintiffs and the defendant in this case.

6. The court did right in refusing the plaintiffs' fifth instruction. The instruction refers to a bill of sale, which is not on the record. The power of attorney to Tiffin had no date, and there was no evidence of when it was executed; the

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instruction refers to a holding of the slaves by Tiffin, without any designation of the time, and relies upon that fact as avoiding the bill of sale to defendant.

Again, a sale made by Tiffin of slaves, which pass without a written conveyance, if he held a power of attorney, and also a bill of sale to himself, would pass the title without any deed, and in whatever form he might think proper to convey.

TOMPKINS, Judge, delivered the opinion of the Court.

Armstead Lawless, Hugh Lackey, and John W. Paulding, commenced an action of trespass on the case against Augustin Guelbreth, in the Circuit Court of Saint Louis county, and judgment being there given against them, they appealed to this court.

It appeared in evidence, that some time in the year 1830, Lawless, one of the plaintiffs, had purchased from Samuel Perry some slaves, to recover the value of two of which slaves this action is brought, the two plaintiffs, Lackey and Paulding, having become interested in them together with Lawless.

The plaintiff proved that the defendant had purchased these two slaves from Clayton Tiffin; that some time in the month of May, 1832, a riot occurred in St. Louis, and the plaintiff, Lawless, being then in possession of said slaves sued for in this action, was compelled to pass over into Illinois; that about five or six months after this riot, the slaves in question were seen in the possession of Clayton Tiffin aforesaid. One witness stated, that some days after the riot, he found Lawless in a field in Illinois; that Lawless then told him that Tiffin had obtained some instrument of writing from him, (whether a bill of sale or a power of attorney, the witness did not recollect,) after he had passed over into Illinois, and that Tiffin would give him no money: this witness also stated that Tiffin, about the same time, told him that Lawless owed him money. A power of attorney, without date, was then given in evidence; it was made by Lawless to Tiffin, and acknowledged before a justice of the peace on the 21st day of May, 1832. This power was extensive, and amongst other things, it authorized Tiffin to sell the negroes in question.

The plaintiff having closed his evidence, the defendant produced and read in evidence, by consent of parties, two bills of sale for the slaves, Sarah and Thomas, respectively, from said Tiffin to the defendant. The defendant also read in evidence a bill of sale purporting to be made by Lawless to said Tiffin for three slaves, viz., Charlotte, the mother, and her two children, Sarah and Thomas, the two last the slaves in dispute: this deed is dated 17th May, 1832. This deed was subscribed by Lawless using his mark, and witnessed by Alexander Amelin, who subscribed his name, and another witness, who used his mark, not being able to write.

The hand-writing of the subscribing witness was proved, he being dead, and the other, who could not write, living in the State of Illinois, in the town of Illinois, opposite to St. Louis. Objection was made to the reading of this deed, because of the non-production of the living witness, and because said Alexander Amelin was proved to be a man of very bad character for veracity.

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It was further proved, that said Lawless had in June, 1832, admitted that he had let Clayton Tiffin have these negroes, but that he did not say whether he permitted Tiffin to hold them as his own, or as his agent.

This evidence being given in, and much more of a most disgusting character, that had very little connection with the merits of the case, the plaintiff moved the court to instruct the jury—

1st. That if they shall find, from the evidence, that the bill of sale from Armstead Lawless, bearing date, &c., was obtained by fraud, they shall find for the plaintiff.

2d. If they shall find, from the evidence, that the bill of sale, &c., was not executed by Armstead Lawless, then they shall find for the plaintiff.

3d. If they shall find, &c., that the bill of sale bearing date, &c., and the power of attorney, purporting to be acknowledged on the 21st of May, 1832, were not executed by Armstead Lawless, or were obtained by fraud from said Armstead Lawless, they shall find for the plaintiff.

These three instructions were given, and the plaintiff then asked the court to give the instructions following:—

4th. If the jury shall find, from the evidence, that the contents of the bill of sale, bearing date, &c., was not read and explained to Armstead Lawless *at and before* he put his mark thereto, the jury ought to find for the plaintiff.

5th. That if they shall find, from the evidence, that Tiffin held the slaves as attorney in fact of Armstead Lawless, the bills of sale from Tiffin to Guelbreth, being in the name of Tiffin alone, give to the defendant no title to the slaves therein named.

These two instructions last prayed were refused. After the three first instructions given by the court, it is not easy to be perceived what object the plaintiff could have in demanding the fourth. To pass over the quaint and equivocal terms used there, "*at and before* he put his mark thereto," it may be remarked, that if he, Lawless, had been informed of the contents of the writing at any time before the execution, it was enough, and even if he had not, then the writing was fraudulently obtained, and there could have been no need of the fourth instruction.

On the fifth, it is useless to say any thing. Tiffin, by conveying in this manner, might make himself liable for the title to the slaves sold, but the conveyance is not the less binding on Lawless.

But the whole merits of the case turn on the instruction prayed by the defendant, viz.: "That if the jury find, from the evidence, that Augustin Guelbreth, the defendant, purchased the slaves in the declaration mentioned, from Clayton Tiffin, for a valuable consideration paid by him to said Tiffin, and without any notice of fraud of said Tiffin in procuring said slaves from Armstead Lawless, then the defendant is entitled to hold said slaves against the plaintiffs." This instruction was excepted to by the plaintiffs.

If Tiffin fraudulently obtained the negroes from Lawless, those negroes would at all times, while owned by Tiffin, be recoverable by Lawless. But if Lawless permit them to remain in the hands of Tiffin till he aliened them to Augustin Guelbreth for a valuable consideration, Guelbreth, in the meantime, being ignorant

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that they were obtained by fraud from Lawless, the peace of society requires that Guelbreth should hold the property for which he has paid a fair price, and which he has obtained in a fair and honest manner; and Lawless must lose his negroes rather than Guelbreth his money, because he put it into the power of Tiffin to sell them to Guelbreth, with the *prima facie* evidence of good title.—See *Parker vs. Patrick*, 5 Term Rep., 175; *Mowrey vs. Walsh*, 8 Cowen, 238.

The deed of Lawless to Tiffin went to the jury with all the discredit of the witness, whose hand-writing was proved, because he was dead. This it was lawful to do, because the other witness was a resident of Illinois, and the case is not altered by the circumstance of his residing near the dividing line of the two States. (1 Starkie, 329.) And, as it appears from the face of the deed, that the second witness made his mark, and consequently did not know how to write, we may conclude he would not have been able to prove any thing had he been present. The evidence is certainly admissible, and the jury have, on the testimony, found a verdict for the defendant.

It is not seen that the jury has been wrongly instructed by the Circuit Court, nor that its verdict is not supported by the evidence given in the cause.

Its judgment is therefore affirmed.

HEARD vs. BABER, AUDITOR OF PUBLIC ACCOUNTS.

The third section of the act of February 27, 1843, concerning the register of lands, providing, that "the fee allowed the register of lands, upon the payment of taxes upon lands or town lots, and all other fees, at the State treasury, shall be paid into the State treasury by the person paying taxes," is not inconsistent with the 32d section of the act of Feb. 27, 1843, to "provide for the sale of lands for the taxes," allowing the register certain fees for every tract of land or town lot which he shall certify out for sale, &c. The former act refers to those fees only which were allowed the register by the act of February 3, 1841, entitled, "An act to establish a register's office; therefore, the register is entitled to the fees allowed him in said 32d section, and the auditor may draw his warrant in favor of the register for the fees allowed him under this section, as the services are rendered.—See Session Acts of 1840, '41, p. 119; also, Session Acts of 1842 '43, p. 105, 137.

PETITION for a Writ of Mandamus.

TOMPKINS, J., delivered the opinion of the Court.

John Heard, register of lands, filed at this term of the Court a petition, that a writ of mandamus might issue against Hiram H. Baber, auditor of public accounts, &c.

The petition states, "that the legislature of this State, at its last session, passed an act, entitled, 'An act to provide for the sale of land for the taxes,' approved

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27th February, 1843; that, by the provisions of the said act, the register was required, as soon as the same could be done thereafter, to make out a full and perfect list of all lands and town lots which had been returned by the several collectors of this State to the proper office, for the non-payment of taxes for the year 1841, or any prior year, including all such lands and town lots as had been sold to the State for taxes, and all such lands as had been returned for the non-payment of taxes for the year 1841, or any prior year, but not forfeited; that said list was required to exhibit, in appropriate columns, the taxes due on each tract of land or town lot for each year, which list the register was required, by the said act, to record in a book to be provided for that purpose; that the register was also, by the said act, required, on or before the 10th day of August, 1843, to make out a fair copy of all the lands and town lots aforesaid, situated in each county, separately, which list was required to exhibit the amount of taxes due on each tract of land or town lot for each year, for State and county purposes, separately, &c.; that the said law provided also, that the register should send the said lists to the respective sheriffs of each county, and that the said register should be entitled to fees for his services rendered herein as follows, *viz.*: For every tract of land or town lot which he should certify out for sale in the year 1843, thirty-five cents; that said law further provided, that such fees should be paid by the State, on the presentation of a certificate of the secretary of state, that the number of tracts of land and town lots certified out by the register under said act was correctly stated in his account, as presented to the auditor."

The petition further states, "that the said register did, under the provisions of said law, certify out 3122 tracts of land and town lots, for which he was entitled to receive the sum of, &c., out of the State treasury; and that he presented his account to the secretary of state, and that the secretary of state did certify to the auditor that the petitioner had certified out the said number of 3122 tracts of land and town lots, &c.; and that the said register did afterwards, on, &c., present to the said auditor of public accounts his said account, certified by the secretary of state, &c., as aforesaid, and requested the said auditor to allow the same, and draw a warrant on the treasurer of the State for the amount of his said account, and that the said auditor refused so to do, &c."

For answer to the conditional mandamus issued on this petition, the auditor returns, that "the law entitled, 'An act to provide for the sale of lands for taxes,' under which the account of the register was made out, became a law, as appears by its approval, on the 27th day of February, 1843; that, on the same day, another law was passed, entitled, 'An act amendatory of an act to establish a register's office, approved 3d February, 1841;' that the third section of this last-mentioned act, of the 27th of February, 1843, provides, that the fees allowed the register of lands upon the payment of taxes for lands and town lots, and all other fees at the State treasury, shall be paid into the State treasury by the person paying the taxes; and that it seems to said auditor this section conflicts with the provisions of the act under which this claim is set up; and further, that if the register be allowed the fee as charged, yet by the thirty-third section of the law under which he claims it, it is provided, that fees herein allowed the register shall be paid by the

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State, but before the register shall be allowed any fees, he shall produce to the auditor a certificate of the secretary of state, certifying the number of tracts of land and town lots certified out by the register under this act; that the account presented to the auditor does not contain all the lands certified out under the act, and, as he is informed, does not embrace more than one-fourth part of the number; and that, believing the register to be entitled to no compensation till all the services by the act required be performed, and until his account therefor be duly certified by the secretary of state, he has withheld his warrant on the treasury for the amount of the account presented: and he concludes by praying the opinion of the court, &c."

The thirty-second section of the act under which the register claims is in these words:—"The register of lands shall be entitled to fees for his services as follows: For every tract of land, or town lot, which he shall certify out for sale in the year 1843, thirty-five cents."

"Section 33:—The fees herein allowed to the register of lands shall be paid by the State."

But, by an act of the same date as the last cited, entitled, "An act amendatory of an act entitled, 'An act to establish a register's office, approved February 3d, 1841,' it is provided —

"Section 1. That so much of the above-named act as provides that the register of lands shall receive a salary of five hundred dollars per year, be, and the same is hereby repealed.

"Sec. 2. The register of lands shall, in future, receive a salary of twelve hundred and fifty dollars per year, to be paid quarterly, out of the State treasury, &c.

"Sec. 3. The fees allowed the register of lands, upon the payment of taxes upon lands and town lots, and all other fees, at the State treasury, shall be paid into the State treasury by the person paying taxes."

The fees allowed the register by the said act of 1841 were —

For services relative to the redemption of every tract of land, one dollar.

For making every deed for land sold for taxes, one dollar.

For services relative to the payment of taxes on every tract of land, twenty-five cents.

For copies of papers or records, ten cents for every hundred words.

There does not seem to be any difficulty in construing these two statutes that both of them may stand.

The act of the last session, which directs "fees allowed the register of lands upon the payment of taxes upon lands and town lots, and all other fees, at the State treasury, to be paid into the treasury by the person paying taxes," refers to those fees only which were allowed by the act of 3d February, 1841, above-mentioned. Those fees are designated so plainly that we cannot be mistaken if we attend carefully to the language, for, says the act, they are to be paid into the State treasury by the person paying taxes.

The register asks for money out of the treasury, on the authority of the thirty-second section of the act to provide for the sale of land for taxes; and in the thirty-third section are these words: "The fees herein allowed the register of lands

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shall be paid by the State," and the fees required by the act amendatory of the act to establish a register's office to be paid into the treasury of the State, are to be paid by the person paying taxes.

The fee of thirty-five cents given by the thirty-second section of the act to provide for the sale of land for taxes, appears to have been considered a compensation for the extraordinary labor imposed by the act on the register. Accordingly, we find in the same thirty-second section, that after the year 1843, when the labor will be less, the fee is reduced to twelve cents.

It is not perceived that any inconvenience can result from the first demand of the register, being made for the compensation allowed for five counties. The subject is fairly divisible, and the law does not provide that all the lands, &c., shall be certified out before he is entitled to his compensation, and it is easy enough to imagine it might be a matter of some importance to the officer to have his warrant at an earlier day.

Let the peremptory mandamus go.

SHIPP & WOODBRIDGE vs. STACKER ET AL.

A. executed to B. his negotiable promissory note, by whom it was transferred to the Mutual Insurance Company, and by that company transferred, after due, to C. The time the note became due, A. had on deposit with said company money nearly sufficient to pay the note, and tendered to the company his check on it for the amount on deposit, and a small sum in money, making together the amount of the note. The company was at that time the owner of the note. *Held*: That this was a sufficient tender, and that the note being transferred to C., the plaintiff, after due, was taken by him subject to all the defences and equities existing between the original parties.

ERROR to St. Louis Court of Common Pleas.

POLK, for Plaintiff.

1. The note on which this action was brought is a note for the payment of money, and, therefore, it can be discharged by a tender of nothing but money.—

2 Starkie's Ev., 1391.

2. If the pleas demurred to in this case are good, then the necessity of a statute of set-off is done away with. Defendant pleads a tender of a debt due by the insurance company to Woods, Christy & Co., and if this be good, all the defendant would have to do in any case would be to execute and offer the plaintiff an order in his favor for the amount of the debt the plaintiff might owe him, and then plead

that as a tender. But at common law, and independently of the statute of set-off, defendant is entitled to deduction of payments in respect of the same transaction only which forms the ground of plaintiffs' action, but not to set-off in nature of a cross-demand.—1 Chit. Plead., 600, 601; 1 Black. Rep., 651; 4 Burr., 2133, 2221; 1 Carr and Payne, 133; (*i. e.*, 11 Eng. C. L. Rep., 345.)

But in this case the debt tendered is created by a transaction entirely distinct from the note. It is even a debt between different parties; a debt due by last endorser to makers of the note. To make the case strongest for appellee, suppose suit had been brought by the insurance company against the present defendant; could it be a sufficient defence, that defendant tendered plaintiff a receipt of Woods, Christy & Co. to them for \$914, and \$6 in money?

3. The check of Woods, Christy & Co., mentioned in the plea, ought to have been pleaded with a *proferat in curia* as well as the money, it being not too inconvenient by reason of bulk and weight.—6 Bac. Abr. 465; Chip. on Contracts, 56, 7, 8, 9, *et ibid.*, 95, 217.

4. If these pleas demurred to are sustained, Woods, Christy & Co., have paid the note, and yet still hold the money with which they paid it; for the money could not pass from them except by the check. But the check not having been received by the insurance company, but refused, of course it was still retained by Woods, Christy & Co., as their property; and it remaining their property, there is no reason why they might not bring suit at any time against the insurance company, and recover the amount of their deposit.

5. But the defence set up in the pleas demurred to cannot operate in the nature of a set-off; for this is not a suit against the makers of the note, who had the deposit mentioned in the plea with the insurance company, but it is against the first endorsers, and the defence set up in the plea is a tender of check to transfer the deposit to the insurance company. But set-off can only be of mutual debts; (1 Chit. Plead., 600, 1;) therefore the debt of the insurance company to Woods, Christy & Co. cannot be a set-off to a claim in favor of Shipp & Woodbridge, against Woods, Stacker & Co. It must, therefore, operate by way of discharging the note. But the note could not be discharged certainly unless the money of Woods, Christy & Co. on deposit with the insurance company was transferred to the insurance company. This could not have been done except by the check. But certainly the check could not operate the transfer unless it had been delivered, for without delivery the property of the check even would not have passed. But the pleas do not allege that the check was delivered; on the contrary, they show that the check was refused.

6. The note in question is payable at the office of the Mutual Insurance Co.; therefore, tender of the money could only be made at such office. But in the pleas the tender is not averred to have been made at the office.—Foden *vs.* Sharp, 4 Johns. Rep., 183; Walcot *vs.* Vansantfoord, 17 Johns. Rep., 248; Caldwell *vs.* Cassidy, 8 Cowen, 271.

Shipp & Woodbridge vs. Stacker et. al.

SPALDING and TIFFANY, for Defendants.**POINTS FOR DEFENDANTS IN ERROR.**

1. The note in question being negotiable under our statute, is governed by the laws applicable to inland bills of exchange.—Rev. Code, p. 105, sec. 6.
2. In England, and most of the States, the laws regulating negotiable notes and bills of exchange are precisely the same, as to liability of the several parties to the holder, so that the decisions relative to the liability of the maker of the note transferred when over-due, are authority in the present case.—Chitty on Bills, 548, 564.
3. An inland bill of exchange, if transferred after due, is taken subject to all the defences and equities existing between the original parties.—Story on Bills, 243, 244; 3 Kent's Com., 61; Chitty on Bills, 242, 243, 244; 7 Term Rep., 626; Bailey on Bills, 133; 1 Mass. Rep., 1; 8 Taun. Rep., 388, (17 Eng. C. L., 402); Pick. Rep., 355; 2 Caine's Rep., 369; 1 Johns. Rep., 118; 1 Johns. Rep., 319; 4 Greenleaf's Rep., 415; 13 Peters' Rep., 65; 1 Johns. Cases, 51, 169, 331; 3 Wend. Rep., 18; 1 McMullin's Rep., 258.

TOMPKINS, Judge, delivered the opinion of the Court.

Shipp & Woodbridge brought their action in the Court of Common Pleas against Woods, Stacker & Co., and judgment being there given against them, they prosecute their writ of error, to reverse that judgment.

The declaration states that Woods, Christy & Co. made their certain promissory note in writing, bearing date the 28th day of December, in the year 1841, and thereby promised to pay, four months after the date thereof, to the order of the said defendants, Woods, Stacker & Co., negotiable and payable at the office of the Missouri Mutual Insurance Company of St. Louis, nine hundred and twenty dollars, without defalcation or discount, and for value received, and then and there delivered the said promissory note to the said Woods and Stacker; and the said Woods and Stacker endorsed and delivered the promissory note to the plaintiffs, Shipp & Woodbridge; and that when the money became due, the defendants, Woods and Stacker, did not pay, &c.

The defendants pleaded the general issue, and two special pleas, in substance as follows, viz.: that the note sued on was endorsed and delivered to the Mutual Insurance Company at the time of its date, which company then and there became, and continued to be, the owner and holder of the same after it became due; and when it became due, said Woods, Christy & Co., the makers thereof, then and before having the sum of nine hundred and fourteen dollars on deposit with the said company, went thither and tendered six dollars in money, and also tendered their check or order for the amount of that deposit, both together making the amount of the note, but that the said insurance company refused to receive the payment, and that the defendants have ever since been ready and willing to pay the said note in the manner aforesaid, and still are ready, &c.; and they aver that, at the time the plaintiff acquired the note, they had notice of the offer by the defendants to pay, &c.

Shipp & Woodbridge vs. Stacker et al.—Stone and Others vs. Graves.

The plaintiffs demurred to the special pleas, and judgment was given on the demurrer for the defendants. This seems to be a very good plea of tender; it being demurred to, the payment of the defendants' money on deposit, \$914, is thereby admitted by the plaintiffs.

The note on which this declaration is framed is negotiable under our statute.—See the 6th section of the act concerning bonds and promissory notes, which declares such notes to be negotiable and payable in like manner as inland bills of exchange; Digest of 1835, p. 105.

Chitty says, "there is a material distinction in the effect of a transfer before a note is due, and one made after that time; in the first case, the transfer carries no suspicion on the face of it, and the assignee receives it on its own intrinsic credit, nor is he bound to inquire into any of the circumstances existing betwixt any of the previous parties to the bill, as he will not be affected by them," &c.

But when a transfer of a bill is made after it is due, whether by endorsement or mere delivery, it has long been settled, that at least it is to be left to the jury, upon the slightest circumstances, to presume that the endorser was acquainted with the fraud, or had notice of the circumstances which would have affected the validity of the bill in the hands of the holder thereof, at the time it became due, &c.—Chit. on Bills, 242, 243.

The statute above cited having declared that notes such as this here declared on "shall be due and payable as therein expressed, and shall have the same effect, and be negotiable in like manner, as inland bills of exchange," the plaintiffs in this action below, and appellants here, will be held to be informed that defendants tendered the money due on the bill or note sued on as in the special plea stated.

The Court of Common Pleas, then, as it seems, committed no error in overruling the demurrers to the special pleas, and the parties to the record having agreed that judgment in this Court may be entered up as if the sum of six dollars due, over above the money of the defendants on deposit in the office of the said company, were already paid, the Court now affirm the judgment of the Court of Common Pleas.

STONE AND OTHERS vs. GRAVES.

1. An action cannot be maintained against a judge or justice of the peace, acting judicially and within the sphere of his jurisdiction, for any error he may commit, however erroneous his decision; or corrupt or malicious his motives.
2. This principle does not extend to ministerial acts performed by a judicial officer. For error or misconduct in such acts, he is responsible in like manner, and to the same extent, as all ministerial officers.
3. Alternative allegations are not allowed in pleading; therefore, a declaration charging that the defendant lost or destroyed, &c., is bad.

APPEAL from Livingston Circuit Court.

SLACK, *for Appellants.*

The appellants insist that the judgment below should be reversed—

1. Because a justice of the peace is responsible to the party injured, for all non-feasance, misfeasance, and malfeasance in office which he may commit, or of which he may be guilty.—Chitty's Plead., 89, 90, 151, 152, 153.

2. Because the declaration in this cause shows a sufficient state of facts to entitle the plaintiffs to recover, those facts taken to be true, as they are upon the general demurrer.

3. Because the causes of demurrer set forth in said defendant's special demurrer are not true, and are contradictory and inapplicable.

4. Because a justice of the peace is bound to preserve all papers filed in his office, for the purpose of being sued on: this is implied from the reading of 6th sec. Rev. Code, p. 350.

5. Because, where the instrument sued on is filed with the justice at the commencement of the action, and purports to have been executed by the defendant, and the demand is liquidated by such instrument, and the defendant has been served with process, it then becomes the duty of the justice to render judgment against the defendant by default. (See Rev. Code, p. 358.) All these facts the declaration sufficiently shows.

STRINGFELLOW, *for Appellee.*

The appellee relies on the following points:—

1. The first and third counts (of the declaration) charge simply an error of judgment, if they show any error in the justice at all; and it being a matter of which he had jurisdiction, he is not liable.

2. The second count is for the loss of a note filed with the justice, for which he is not liable in damages; nor does it show that plaintiff was injured by such loss, nor could he have been injured.

3. Each count of the declaration is uncertain, and does not show any cause of action.

SCOTT, J., *delivered the opinion of the Court.*

The appellants, plaintiffs, brought an action on the case against the appellee, defendant, a justice of the peace, for misconduct in office. The declaration contained three counts: the first and third charged, that the defendant, being a justice of the peace, did corruptly and wilfully refuse to enter a judgment in a suit pending before him, in which the appellants were plaintiffs, and one Pettigrew was defendant; the second count charged the appellee with neglect, by which the note on which suit was brought was lost or destroyed. To this declaration

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there was a special demurrer, which was sustained by the court, and a judgment rendered for the appellee, defendant. From this judgment the appellants, plaintiffs, appealed to this Court.

This case presents the question whether a justice of the peace, when acting judicially and within the sphere of his jurisdiction, is liable to an action for any error he may commit, although he may act from impure and corrupt motives? It is not pretended, that for malice, corruption, partiality, or any misdemeanor in office, a justice of the peace, when acting judicially, is exempt from punishment, but the question is, whether he is liable to a civil action by the party aggrieved? In the case of *Lansing vs. Yates*, 5 Johns., 291, a case of intense interest, and which was profoundly investigated both by the bench and the bar, Judge Kent remarks: "The doctrine which holds a judge exempt from a civil suit for any act done or omitted to be done by him sitting as a judge, has a deep root in the common law. It is to be found in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decisions in the English courts, amidst every change of policy, and through every revolution of the government."

Serjeant Hawkins maintains, (book 1, chap. 7,) that the law has freed the judges of all courts of records from all prosecutions whatsoever, except in the parliament, for any thing done by them openly in such courts. Lord Holt, in *Grosnvelt, vs. Burwell*, is equally explicit, that a judge shall not be questioned at the suit of the parties.—1 Lord Raymond, 468.

The maintainance of this principle is essential to the due administration of justice. If, for every erroneous judgment in the discharge of his duties, a justice was held responsible in damages, hard, indeed, would be his condition. Law is a moral, and not a mathematical science. What is the law in many cases is a mere matter of opinion, and about which the most upright and enlightened judges will differ. The rules and principles which govern, in the exercise of judicial power, are not in all cases plain; they are often complicated, and appear in different views to different men. Few would accept the office of judge, if they were to answer with their estates for every error in judgment, or if they were to be harassed with litigation by every unfortunate or disappointed suitor.

In *Moysten vs. Fabrigas*, Cowper, 161, Lord Mansfield says—"That, by the law of England, if an action is brought against a judge of a court of record for any act done by him in his judicial capacity, he may plead that he did it as a judge of a court of record, and that will be a complete justification." This principle has been invariably acknowledged, and has received the sanction of the courts of many of our sister States. In the case of *Phelps vs. Sill*, in the Supreme Court of Connecticut, 1 Day's Cases in Error, 315, a suit was instituted against a judge of probate for neglecting to take security from a guardian, and the court held the action did not lie. It was held to be a settled principle, that a judge is not to be questioned in a civil suit for doing, or for neglecting or refusing to do a particular official act in the exercise of judicial powers. The Supreme Court of South Carolina, in the case of *Lining vs. Bentham*, 2 Bay's Rep., held unanimously, that a justice of the peace was not liable to an action for what he did in his judicial capacity, though he was subject to indictment if he acted oppressively.

In *Brodie vs. Rutledge*, *ibid.*, it was declared to be a well-ascertained principle of law, that no action could be brought against a judge for any judgment rendered by him in his judicial character, though liable to impeachment.

Although a judge, or justice of the peace, when acting judicially and within the sphere of his jurisdiction, is not responsible, in a civil suit, for a mere error of judgment, yet from the *dicta* of judges in some cases, and from not discriminating between judicial and ministerial acts, an opinion is entertained by some, that although a judge, or justice of the peace, acts judiciously, and within the sphere of his jurisdiction, yet if he suffers his judgment to be swayed by malice or corruption, he is responsible, in damages, to the party aggrieved. The whole tenor of the opinion of the court in the case of *Lansing vs. Yates* before cited, in which the whole learning on this question is exhausted, repels this idea. In the case of *Cunningham vs. Bucklin*, 8 Cowen Rep., Chief Justice Savage, in delivering the opinion of the court, says: "No case has been produced showing that a judge of a court of record has ever been held responsible in a civil action, even for misconduct in office. Holt says, that they have been laid by the heels and compelled to ask the king's pardon, by which I understand they were removed from office. Indeed, the same reasons operate in some measure to protect them against all suits, whether arising from their errors or their crimes. If an action were to lie at all, it would be easy for every person dissatisfied with the decision of the court, (and one party is always dissatisfied,) to allege corruption, and thus harass the judges, whose time and property, if they happen to have any, would be wasted in defending suits, which, if not founded in, might be supported by, corruption. Hard, indeed, would be the condition of a judge, if he were thus exposed to never-ending litigation. Chitty, in his *Treatise on Pleading*, understands the authorities in the same way, and relies on some referred to in this opinion, in support of the principle, that an action cannot be supported against a judge, nor a justice of the peace, acting judicially, and who has not exceeded his jurisdiction, however erroneous his decision, or malicious his motive:" 69.

The case of *Gregory vs. Brown*, 4 Bibb, 28, is often cited, in support of a doctrine contrary to the foregoing. But upon an examination of that case it will be found, that the point did not arise. That was not an action for acting maliciously or corruptly; the conduct of the justice was not imputed to corrupt and impure motives, and there was a judgment for the defendant: the court, in delivering its opinion, said: "An action will not lie against a justice of the peace for a judicial act within his jurisdiction, unless he has acted from impure and corrupt motives." So this was no point decided, but merely a *dictum* uttered in delivering an opinion.

This principle is not to be understood as extending to ministerial acts required to be performed by an officer whose functions may be sometimes judicial. Some of the duties of a justice are judicial, and some ministerial; and when he acts ministerially, or is required to do a ministerial act, for error and misconduct he is responsible in like manner, and to the same extent, as all other ministerial officers. The distinction is between judicial and ministerial acts. The rendering a judgment is purely a judicial act. The justice must determine whether the

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record and proceedings before him will authorize such measure, and for this exercise of his judgment he is not responsible in a civil action. The demurrer to the first and third counts was therefore properly sustained.

The charge in the second count is, that the defendant neglectfully and carelessly lost or destroyed the note left with him for suit. This mode of declaring is not allowable. In the same count a party cannot be charged in the alternative, with doing an act, or another and a different act; he should have employed two counts to make the several charges.

Judgment affirmed.

TUTTLE vs. GORDON.

Where the answer of a garnishee is not denied in a proper manner, the garnishee should move to dismiss the proceedings against him, and not demur to the denial.

ERROR to Clay Circuit Court.

TOMPKINS, Judge, delivered the opinion of the Court.

Thomas C. Gordon sued Nelson P. Owens, by attachment on a liquidated demand, as it appears by the transcript sent up; and Tuttle being summoned as garnishee, answered, that he had no funds of Owens' in his hands, and said, that at the time he was summoned as garnishee in said suit, he had no property of any kind belonging to the defendant in his hands, or under his control, nor has he since had any; that, at the time he was summoned as garnishee in this cause, he was, on settlement, indebted to the defendant in the sum of \$900, all of which money he has paid on other judgments obtained against said defendant, in which he had been summoned as garnishee, before he had been summoned as such in this cause.

The plaintiff denied the truth of the answer, and averred that, at the time Tuttle was summoned as garnishee in the cause, he was indebted to the defendant in a much greater sum than nine hundred dollars, to wit, in the sum of fifteen hundred dollars.

Neither party requiring a jury, the court, sitting as a jury, found the garnishee, Tuttle, indebted to the defendant, Owens, in a much greater sum than nine hundred dollars, and gave judgment against him for \$228, the amount of the judgment obtained by Gordon against Owens.

On the trial of the cause, the garnishee, Tuttle, offered to file a demurrer to the denial of his answer by the plaintiff, and the court refused to permit him to do so. He excepted to the opinion of the court. It seems to me that it would have been a more proper course for the garnishee to move the court to dismiss the proceed-

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ings against him, if he supposed his answer not sufficiently denied by the plaintiff. An insufficient denial might amount to an admission of the truth of the answer, and in such case the garnishee might be discharged; but I am of opinion that the answer of the garnishee was denied in terms plain and direct enough, and that the Circuit Court committed no error in refusing to the demurrer a place on the record.

In a second bill of exceptions, it appears, that the allegations and interrogatories filed in the Platte Circuit Court (whence this cause was transferred to the Clay Circuit Court) had not been marked as filed there. This is a very slight objection, since Tuttle, by coming and answering the interrogatories, has cured the defect of not filing in the Circuit Court of Platte county. It might otherwise have been necessary to send the papers back to file them in that court.

It was also in evidence that Tuttle had been heard to admit that he and Owens had a contract for making brick for the United States, at the garrison, as partners; and that if they did not furnish any more brick, Owens, the defendant, would have coming to him \$1,500 or \$2,000; and that he had received information from the officer of the post that his money was ready.

This being the evidence in the cause, the garnishee, Tuttle, moved the court to grant a new trial, because the evidence was not sufficient to warrant the verdict and judgment in the cause. The evidence seems amply sufficient to justify the verdict and the judgment of the court in the cause, and it is to be presumed that the garnishee so regarded it, otherwise he would not have consented that the judge should sit in the cause to perform the office both of judge and jury.

In cases of doubt and difficulty it seems that the parties ought to have a jury, and not to ask of the court to perform the office both of judge and jury; but in this case, there seems to have been no room for doubt, and the judge seems to have discharged very correctly his two-fold duties.

The judgment is affirmed.

MCLEAN vs. THE STATE.

1. Although it is the province of the judge, and not that of the jury, to determine whether the dying declarations of the deceased are admissible, in cases where the death of the deceased is the subject of the charge, yet where the whole subject was left to the jury, under the direction of the Court, and it was apparent that the accused had sustained no injury from the manner in which the declarations were introduced, the Court refused to reverse the judgment on account of such irregularity.
2. In capital cases, and, indeed, in all cases of felony, the jury, after they are sworn, should not be permitted to separate until they have rendered their verdict, and if permitted to separate, the judgment will be reversed.

ERROR to St. Louis Criminal Court.

BLENNERHASSETT, for Plaintiff in Error.

POINTS AND AUTHORITIES.

1. The court should have continued the trial of said cause until the January term, the affidavit of the said McLean, for that purpose, being entirely sufficient, and containing every allegation required by statute. And, by reference to the testimony of Rucker, Coyers, and Hugh Rogers, the materiality of the testimony of Brown, on the account of whose testimony the motion was made, is apparent, and corroborates the truth of the affidavit.—*People vs. Vermylea*, 7 Cow. 525; 6 Cow. Rep., 577; 5 Cow. Rep., 15.

2. The jury, after they are sworn, should not be permitted to have separated until they had rendered their verdict. This is the rule in England, as also in this country. In the case of the *King vs. Stone*, 6 Taunt. Rep., 530, which was an indictment for high treason, the court adjourned from night until next morning, the jury retired to an adjoining tavern, and bailiffs were sworn well and truly to keep the jury,—“neither to speak to them themselves, nor to suffer any other person to speak to them,” &c. And in *Comp. Digest*, title, “Inquest F.,” it is expressly laid down, that, after the evidence is given, the jury ought to continue together till they agree of their verdict, without eating, drinking, fire, or candle, or speaking with any one, &c. Then cases of necessity, as an affray, the falling of the house, &c., are given as justifying the jury in separating. In 4 *Black. Com.*, 360, it is said, that when the evidence on both sides is closed, and, *indeed, when any evidence has been given*, the jury cannot be discharged (unless in cases of evident necessity,) till they have given in their verdict.—See also *Gould’s case* in *Fost.*, 27; *Day’s Rep.*, 287; 2 *South. Rep.*, 827; *Commonwealth of Virginia vs. McCant*, *Virginia Cases*, 271; 2 *Leigh. Rep.*, 750; *Martin’s case*, *Walker’s Intro. to Am. Law*, 640; 1 *Cow. Rep.*, *Smith vs. Thompson*, 221, and note.

3. The court should have decided, as a question of law, whether the declarations of Floyd were admissible as evidence or not. This was refused to be done, and left to the jury as a question of fact.—*Greenleaf*, 190, sec. 160; 1 *chap. Cr. Law*, 570; 1 *Starkie’s Rep.*, 521–3; 1 *East. P. C.*, 360; *Ibid.*, 358; 3 *C. and P.*, 629; 6 *C. and P.*, 386; 7 *C. and P.*, 187–190; 1 *Hawks*, 444; 1 *Leach*, 504; 14 *Eng. Com. Law Rep.*, 474, note; *Ibid.*, 494.

4. The dying declarations of Floyd were improperly admitted; the evidence being insufficient to show that they were made *in extremis*, and under a sense of immediate dissolution.—*Greenleaf*, 188, sec. 158; *Ibid.*, 189, and cases in note 4; 1 *East P. C.*, 357; 6 *C. and P.*, 386; *Ibid.*, 631; 7 *C. and P.*, 187; 2 *Russel on Crimes*, 685; 14 *Eng. Com. Law Rep.*, 494.

5. The evidence introduced on the part of the State was insufficient to warrant a conviction. If the fact, that the plaintiff in error assisted in digging Floyd’s well, be omitted, the conviction then rests wholly upon the declarations of the

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deceased; and though we may concede, for the sake of argument, that those declarations were properly before the jury, yet it must be recollected that the person to be affected by them was not present when they were made, had not the power of a cross-examination; and that, from the circumstances necessarily attending the commission of such an offence, such confusion and surprise must have existed, as could not but lead to mistakes as to the identity of persons, and the omission of facts materially important to the completeness and truth of the narration. — See Greenleaf on Ev., 192; 1 Phil. and Am. on Ev., 305, 6; 2 Johns. Rep., 356; 2 Poth. Obl., 255; 2 Starkie, 263.

S. M. BAY, *Attorney-General, for The State.*

POINTS AND AUTHORITIES.

1. That the court properly refused the second application for a continuance:—

1st: Because the accused, in his affidavit, did not show that he had used due diligence to procure the attendance of Brown.

2d: Because the facts which the accused supposed he could prove by said Brown were immaterial.

2. The Criminal Court did not err in permitting the jury to separate:—

1st: Because, at common law, it is matter of discretion with the court whether the jury should be kept together until all the evidence is received, or whether they shall be permitted to separate.

2d: Because there is no evidence that the Criminal Court improperly or unsoundly exercised this discretion.—See *The King vs. Worlset et al.*, 1 Ch. Rep., 401, cited in 1 Cowen's Rep., 227; Statutes of Mo., 1835, title, "Practice and Proceedings in Criminal Cases," art. 6, sec. 14.

3. Although it is now settled that the court, and not the jury, are to decide whether, under the circumstances of the case, the dying declarations ought to be admitted, yet it is evident that the deceased considered himself, at the time he made the declarations, in a dying condition, and past all hope of recovery, and actually was in such condition. Therefore, the evidence was clearly admissible, and the court will not reverse the judgment because the evidence was introduced in an irregular manner, particularly as it is not pretended that the defendant was not prejudiced by the manner in which the evidence was introduced.

4. Admitting that the declarations of the deceased were properly in evidence, then it is clear that the verdict is sustained by the evidence, for the declarations of the deceased, as to the identity of the defendant, and to the fact that the defendant was the person who gave him the mortal wound, are positive, and uncontradicted by any of the testimony.

5. The motion for a new trial was properly overruled, not only on account of the suspicious character of the testimony of Bartley, but of the utter insufficiency of the matter contained in the affidavit.

TOMPKINS, Judge, delivered the opinion of the Court.

At the September term of the Criminal Court for St. Louis county, the appellant, James McLean, was indicted for murder in the first degree, and at the November term of that court, next succeeding, he was tried and found guilty.

To reverse the judgment of the Criminal Court, this appeal is prosecuted.

In the bill of exceptions, it appears, that during the said term of November, to wit, on the 12th day of December, 1842, he prayed a continuance of his cause, and at the same time filed his affidavit, that one James Brown is a material witness for him, the defendant, and that he could not safely go to trial without the evidence of said Brown; that some two or three months since, the said Brown went to Galena on business, but with the intention of returning to St. Louis, his place of residence, on or about the first of November last past; that said Brown had not returned to St. Louis, and that the affiant had good reason to believe Brown would return at the next term of the court, &c.; that the affiant expected to be able to prove by said Brown, that he and Brown slept together in the stable of one Long, in the city of St. Louis, on the night that Gabriel Floyd, the deceased, was murdered, and for whose murder the affiant was indicted, from the hour of ten of the clock of that night till the next morning, when the affiant was arrested, &c. The court overruled the motion of a continuance, and proceeded on that day to empanel a jury. Seven jurors were sworn to try the issue, and the residue being challenged and set aside for cause shown, the marshal was ordered, forthwith, to summon thirty-six others to appear on the fifteenth day of said month of December. The seven jurors were left at liberty to go where they pleased, from the 12th day of said month of December till the 15th, the court charging them to hold no conversation with any person. Exceptions were taken to the refusal of the court to grant the continuance, and the action of the court in permitting the seven jurors to go at large as aforesaid. On the said 15th day of December, five other persons were sworn on the jury.

The first witness examined was the wife of the deceased: she stated, that about ten o'clock at night, of the 26th of August, 1842, she retired to rest, but did not sleep; that about half an hour after, she heard footsteps about the front door, and some person turning the lock; her husband got up, took his gun, and went to the door, and she went to the servants' room to call them to his assistance, and was met by two men, when she opened the door to let them out: one of them presented a pistol to her, and said if she spoke he would blow her through; saying they only wanted money, and asked how much they had, &c.: that when she saw her husband he was much cut and beaten, and had a stab in his left side; he asked her to lay him down on the bed; said he was dying. Here the counsel for the State desired the witness to relate what her husband said. To this the counsel for the prisoner objected, and insisted that, whether the declarations of the deceased should be given in evidence or not, was a question of law to be determined by the court; and that, in order to enable it to decide whether they were admissible, evidence should be given to the court whether the deceased regarded himself *in articulo mortis*, and past all hope of recovery, when he made

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the statements now sought to be given in evidence. The court overruled the objection, and permitted the witness to proceed with her testimony. This decision of the court was excepted to, and the witness was permitted to proceed. She proceeded to state, that he was very faint, but recovered a little, and said he recognized the man *Mack*, who assisted in digging the well, and that he said, "*Damn you, I would not have dirked you if you had not resisted;*" that the deceased stated, that he recognized *McLean* as the man that beat him and stabbed him with the dirk. The deceased lived thirty-one hours after he was stabbed, and at various times before his death made these declarations. It is stated on the record, that here, the hour of adjournment having arrived, the court adjourned until the next day, and that the jury were allowed to separate and go at large, to which objection was taken, and the objection overruled. At the usual hour on the next day, the court met, and the examination of the witness was continued.

The witness stated, that the first time she saw her husband after he went out, he was standing in the bedroom, and he said, "I am dying, lay me down." He was then laid on the bed by the servants; he expressed no hopes of recovery, and seemed perfectly resigned: he was lying in bed when he made his statements, and witness presumed the deceased made his statements with a view to their being given in evidence.

Several other witnesses testified to the declarations of the deceased. From them, it appears, that on hearing the footsteps at his door, the deceased got up, and took his gun in his hand, and, when the door was opened, he was dragged out, (his gun having missed fire) and beaten with sticks; after the assailants ceased to beat him, he made his way into the house, he knew not how, and was stabbed after he had gotten into his bed-room. The witnesses all concur that while he made these statements, he also declared that he did not believe he should ever recover; called himself a dead man, &c. It was in evidence that the deceased lived betwixt three and four miles from the stable in St. Louis where the accused went to bed, as appears by the evidence of several witnesses, about ten o'clock of the night on which the murder was committed, and at which stable he was arrested the next morning.

After verdict and judgment, the defendant moved for a new trial, for the reasons following:—

1. Because the court permitted the seven jurors, first sworn and empannelled, to separate and go at large for several days.
2. Because the court did not keep the jury together, under the charge of an officer, until they delivered in their verdict.
3. Because the court refused to grant a continuance.
4. Because the declarations of the deceased were admitted in evidence.

The indictment had been found at the September term, and the continuance till the November term was almost a matter of course; and probably the continuance was as necessary to the State as to the prisoner. It would seem, then, that on so important an occasion, when a man's life was at stake, it was not very unreasonable to ask a continuance till the next succeeding term of the court.

In *Greenleaf's Evidence*, p. 190, sec. 160, it is said—"The circumstances

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under which the (dying) declarations were made are to be shown to the judge, it being his province, and not that of the jury, to determine whether they were admissible. In Woodcock's case, (2 Leach's Cr. Cases, 557,) the whole subject seems to have been left to the jury, under the direction of the court, as a mixed question of law and fact; but subsequently, it has been held a subject exclusively for the consideration of the court, being placed on the same ground with the preliminary proof of documents, and of the competency of witnesses, which is always addressed to the court. But after the evidence is admitted, its credibility is entirely within the province of the jury, who, of course, are at liberty to weigh all the circumstances under which the declarations were made, including those already proved to the judge, and to give the testimony, upon the whole, only such credit as they may think it deserves."

The testimony of the first witness in the case was well calculated to mislead the judgment. The witness, wife of the deceased, said: "When I first saw my husband, he was much cut and beaten, and had a stab in his left side; he asked me to lay him on the bed, said he was dying," &c. The declarations of the deceased, testified to by other witnesses, were in like manner mingled with such declarations as these, viz.: that he was dying—was a dead man—or that he could never recover. And although it seems that no court could, on hearing these statements of the witnesses, hesitate to decide that the declarations of the deceased ought to have been received in evidence, yet, as the Criminal Court transgressed the rule of evidence, as it is now understood, in suffering these declarations to go to the jury before it had examined the witnesses, to enable it to determine whether they were *in articulo mortis*; and as, in a capital case, it seems to me improper for this Court to assume the authority to say, that the prisoner was not injured by this error of the Criminal Court, I am of opinion, that for this error, the judgment of that court ought to be reversed.

In a note to the case of *Smith vs. Thompson*, (1 Cowen, 244,) all the cases concerning the separation of jurors are reviewed. The result of all is, that a verdict will not be set aside merely because a jury have separated without leave of the court, when it has not been proved that they have been tampered with, or their verdict is not so inconsistent with the evidence as to raise the presumption of influence *aliunde*; and that in cases of misdemeanor, the jury may disperse with leave of the court. This is the result of the English cases; and it is there added that the American cases on this subject present nearly the same view of the question. But the better opinion, on considering all the cases cited in the note above mentioned, is, that in capital cases, and in cases of felony in general, the jury ought to be kept together; and that, although occasions may occur in cases of imminent danger, &c., on which jurors may be excused from fine for dispersion, yet it is the duty of the court to keep them under the charge of an officer when it is not in session. To the same purpose, see the case of *The People vs. Douglass*, 4 Cowen, 35.

Our statute provides that, "The proceedings prescribed by law in civil cases, in respect to the empannelling of jurors, the keeping of them together, and the manner of rendering their verdicts, shall be had upon trials on indictments and

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prosecutions for criminal offences, except in cases otherwise provided by statute.—Section 14, article 6, of the act to regulate proceedings in criminal cases, p. 490 of the Digest of 1835.

It has not been suggested by counsel, nor has it been found on examination of our statute law, that the legislature has made any statutory provisions for keeping juries together in civil cases, or in trials on indictments and prosecutions for criminal offences. It seems, then, there is nothing in our statute on which the above-recited provision can act; and the consequence, therefore, is, that we are left as we were at common law.

The majority of the Court does not concur with me in opinion, that the judgment of the Criminal Court ought to be reversed, because that court suffered the declarations of the deceased to go to the jury before it took time to examine whether they were made under a sense of impending death, because no injury has been done to the prisoner by their admission in evidence. But all the Court concur in opinion, that a new trial ought to have been granted, because the jury, after being sworn, were permitted to go at large while the court was not sitting.

It was contended, that the weight of evidence was much against the finding of the jury. Nothing will be said on that subject, as it is but right that the jury should be uninfluenced by the opinion of the Court as to the weight of evidence, and because the judgment will be reversed on another point.

The judgment of the Criminal Court is reversed, and the cause will be remanded to that court, to be proceeded in conformably to this opinion.

BROWN vs. PEARSON.

1. The transcript of the docket of a justice of the peace is evidence only of such matters as he is by law required to place there. Therefore, where the justice stated on his docket that the agent of the plaintiff released one of the defendants from the note sued on, it was held no evidence of a release.
2. In a suit against two or more on a joint note, the plaintiff may enter a *nolle prosequi* as to one without discharging the others.—See R. S. 1835, title, "Practice at Law," art. 3, sec. 18, p. 459; and act of Feb. 13, 1839, concerning Practice, sec. 1, Session Acts of 1838, '39, p. 99.

APPEAL from the Audrain Circuit Court.

NAPTON, Judge, delivered the opinion of the Court.

This was an appeal from a judgment obtained before a justice of the peace, on a note signed by defendant and one W. G. Brown. On the trial in the Circuit Court, the defendant, Felix Brown, offered to read, and did read, an extract from

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the docket certified by the justice, to the following purpose: "The aforesaid W. G. Brown was released from the said note by M. Pearson, agent for said Joseph Pearson, plaintiff, on the day of trial." Whereupon the court was called upon to instruct the jury, that if they believed from the evidence that the plaintiff had released either of the obligors in said note, it is a satisfaction of the debt.

This instruction was given, but it was further added, that in order to release a party from his liability on a note, the release must be in writing, signed by the person interested in the note, or some person duly authorized by him. Exceptions were taken to this opinion of the court, and this is the matter of error relied on to reverse the judgment.

This entry of a release upon the docket of the justice was, obviously, not contemplated as a discharge of the others, since the plaintiff proceeded to take judgment; and if it had been so designed, the justice had no authority to make such entry on his docket. The transcript of the docket of a justice of the peace is evidence only of such matters as he is by law required to place there. — *Perry vs. Block and Others*, 1 Mo. Rep., 480.

If it was designed, as it seems probable it was, as an entry of a *nolle prosequi*, it would not have the effect of discharging the other parties to this judgment. It is laid down by Chitty, (*Chitty's Plead.*, 599,) that in actions, in form *ex contractu*, unless the defence be merely in the *personal* discharge of one of the defendants, as bankruptcy, a *nolle prosequi* cannot be entered as to one defendant without discharging the others, for the cause of action is entire and indivisible. In the case of *Minor and Others vs. the Mechanics' Bank of Alexandria*, (1 Peters' Rep., 47,) the Supreme Court of the United States reviewed the authorities on this subject, and came to the conclusion that, even at common law, a *nolle prosequi* did not amount to a *retraxit*, but simply to an agreement not to proceed further in that suit, as to the particular person or cause of action to which it applied. In *Hartness vs. Thompson*, (5 Johns. Rep., 160,) where an action was brought against three, upon a joint and several promissory note, and there was a joint plea of *non assumpsit*, and the infancy of one defendant pleaded, it was held, that upon a verdict found in his favor, against the other two defendants, the plaintiff might enter a *nolle prosequi* as to the infant, and take judgment upon the verdict as to the others. In *Woodward vs. Marshall*, (1 Pick. Rep., 500,) upon a joint contract and suit against two persons, one of whom pleaded infancy, it was held by the Supreme Court of Massachusetts that a *nolle prosequi* might be entered as to the infant, and the suit prosecuted against the other defendants.

It will be perceived that the Supreme Court of the United States, in the case of *Minor vs. the Mechanics' Bank*, have gone further than the courts did either in Massachusetts or New York.

The court proceed on the ground that the question was one of practice, rather than principle, to be decided upon considerations of policy and convenience; and therefore held, that where the defendants severed in their pleadings, whether the pleas involved a personal discharge or not, a *nolle prosequi* ought to be allowed.

It is not necessary for us to rely upon the authority of that case, to justify the same conclusion to which the court there arrived.

Brown vs. Pearson.—Woodward and Thornton, Administrators, vs. McGaugh and Brown.

Our statute (Rev. Code, 1835, p. 459,) provides, "that every person that shall have a cause of action against several persons, and be entitled by law to only one satisfaction therefor, may bring suit thereon jointly against all or as many of the persons liable as he may think proper.

The act of February 13, 1839, provides, that "in actions founded on contract, and instituted against several defendants, the plaintiff shall not be non-suited by failing to prove that all the defendants are parties to the contract, but may have judgment against such of the defendants as shall have been proven to be parties to the contract."

This last provision of our statute appears to destroy all distinction between actions in tort and those founded on contract, so far as the forms of pleading in the two actions are concerned, and there is no reason, whatever may be the weight of authority and reason on common law principles, that a *nolle prosequi* in actions on joint contracts, since the passage of this act, should be held to have any different operation from what a *nolle prosequi* would in actions founded on tort. At common law, if parties were jointly liable, the plaintiff was obliged to proceed against all, and an omission of a party jointly liable with the other defendants could be pleaded in abatement.—1 Saund., p. 291.

The contract being considered one and indivisible, and the cause of action entire, a *nolle prosequi* as to one released the others.

Such is not the law now; at least since the passage of the act of assembly above recited. This rule, however, must be understood to be a matter of practice and convenience, and it is not intended to be established that a party is at liberty to *release* one of several co-obligors, without releasing the others. The rights of co-securities, as between each other, is not designed to be affected by regulations concerning the forms of pleading.

The entry of the *nolle prosequi* on the docket of the justice, as to W. G. Brown, if it be construed a *nolle prosequi*, did not operate to discharge the other defendant, Felix Brown.

Judgment affirmed.

WOODWARD AND THORNTON, ADMINISTRATORS, vs. MCGAUGH AND BROWN.

1. In a suit brought by administrators or executors, on a cause of action accruing to them as administrators or executors since the death of their intestate or testator, the defendant cannot set-off a debt due him from such intestate or testator.
2. Parol evidence to the effect that there was an understanding between the obligor, in the bond sued on, and the obligee, at the time of the execution of the bond, that the latter would not hold the former responsible on the bond, is inadmissible. Where a contract is reduced to writing, the presumption of law is, that the writing contains the whole contract, and a party will not be permitted to contradict his written agreement by parol evidence.

ERROR to Ray Circuit Court.

EDWARDS, for Plaintiffs in Error.

1. The testimony introduced by the defendant is wholly inadmissible, because it would be allowing parol testimony to vary the terms of the written agreement, or to superadd a substantive collateral agreement wholly inconsistent with the terms of the former.—2 Starkie, 551, 554, 555, 570; Chitty on Contracts, p. 25; *Lane vs. Price*, 5 Mo. Rep., 101.

2. Admitting that it is competent for the defendants to prove fraud, covin, and misrepresentation of the plaintiffs, and thereby render the instrument in suit inoperative, as to one or all of the defendants, the evidence introduced does not support the defence, because—

1st: There is no evidence of any fraudulent design, and the law will not presume fraud.—2 Kent, 490; 3 Ames' Dig., 14, and Suppl. notes, 3, 4, 5; *Bowers vs. Crafts*, 18 Johns. Rep., 110; Chitty on Contracts, 223.

2d: Representations made by an agent, or one acting in a fiduciary character under a naked authority, are an exception to the general rule, and are not binding unless it manifestly appear that the agent acted in the scope of his authority, and was empowered, in his capacity of agent, to make the declarations and representations relied upon.—Chitty on Contracts, 220, note; *Watkins vs. Sackett's Administrators*, 6 H. and L., 435; *Lee vs. Munroe and Thornton*, 7 Cranch, 366.

3. Woodward and Thornton are but nominal plaintiffs, and are so wholly disinterested in the transaction, that either or both would have been competent witnesses to establish the demand in suit. The parties really in interest are the heirs and creditors of the intestate, and the administrators had no power to make any agreement to the prejudice of the former, to the making of which the legal powers of the latter did not extend, and such agreement would be void.—1 Mo. Rep., 214; 1 Starkie, 136, 140, 149; *Lee vs. Munroe and Thornton*, 7 Cranch, 363; *The Bank of the United States vs. Dunn*, 6 Peters, 51; Rev. Stat., 48, sec. 31; *Lair vs. Miller*, 6 Littell, 67; 2 Starkie, 326.

4. The acts of administrators depend, for their validity, upon the facts, first, that the act was done in the exercise, and second, within the limits of their powers. If they transcend in any essential particular, their act is void.—4 Peters' Cond. Rep., 666; *Mechanics' Bank vs. Bank of Columbia*, 5 Wheaton, 326; 10 Peters, 161; 2 Starkie, 34; 2 Kent, 617, 619, 620; Chitty on Contr., 57, 60; 5 Johns. Rep., 57; 7 Johns. Rep., 390; J. J. Marshall, 291.

5. Persons dealing with those acting under an authority or power, are bound to know the extent of that power. The statute defines the limits of an administrator's power, and expressly requires him, on the sale of his intestate's effects, to take bond with security. It then becomes matter of law, and a defendant will not be allowed to say he was ignorant.—Rev. Stat., p. 48, sec. 31; 1 Peters, 607, and authorities above referred to.

6. Would not an agreement, like that proved by the witness, be a parol promise

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to answer for the debt, default or miscarriage of another, (McGaugh,) and void under the statute?—Rev. Stat. p. 117, sec. 1.

7. An agreement like that proved could, at most, be equivalent to a promise by the administrators to pay the debt of McGaugh; and it is an old and well-settled rule, that such promise of an administrator is to be measured by the assets of the estate.

8. The judgment is informal, and not in pursuance of the finding of the court.

9. There is no evidence authorizing a verdict against the plaintiffs, for the defendant, for any amount whatever.

Dunn, for Defendants in Error.

1. The parties are not precluded from proving the facts consistent with the writing, although not expressed in it.—3 Starkie's Ev., 1046.

2. The finding of the court upon the facts is, for all legal purposes, a verdict, and, as such, will not be set aside, unless the evidence greatly preponderates in favor of the party seeking a reversal.—4 Mo. Rep., 295; 6 Mo. Rep., 61.

3. The finding is agreeable to equity and justice upon the whole matter disclosed: there is, therefore, no error in the refusal of the court below to set it aside.—2 Black. Com., 299, note 2; 4 Term Rep., 468.

NAPTON, Judge, delivered the opinion of the Court.

Woodward and Thornton, administrators of W. W. Mauzey, deceased, brought an action of assumpsit against the defendants, McGaugh, Brown and Davis, upon a promissory note executed by them to plaintiffs, for \$175 56 $\frac{1}{4}$, and payable twelve months after date. Process was served on McGaugh and Brown only. At the December term, 1840, McGaugh and Brown pleaded jointly the general issue: but afterwards, at the same term, withdrew this plea, and pleaded severally the general issue, with notice of set-off. Each of these set-offs were debts due by the intestate,—McGaugh's amounting to one hundred and sixty-two dollars and thirty-seven cents, and Brown's to three dollars and sixteen cents, both of which had been duly allowed by the County Court against the estate of Mauzey, as alleged in the notices of set-off. A motion was made to set aside these pleas, but the same was overruled by the court; and afterwards, as appears by the entries on the record, the defendants withdrew their pleas as to McGaugh, and judgment by *nil dicit* went against him, and the issue between Brown and the plaintiffs was submitted to the court, and the court, upon hearing the evidence, found for the defendant twenty-seven dollars and eleven cents damages. Judgment went accordingly. A motion for a new trial was made, but overruled.

It appears, from the bill of exceptions, that the note sued on was given in consideration of goods purchased at the sale of the effects of W. W. Mauzey, deceased, by his administrators, and that Brown was security in the note. Proof was introduced to show that Brown signed the note upon the representation of Woodward; that the estate of Mauzey was indebted to McGaugh in a larger sum,

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and his promise that he would allow the same as an offset against the note given by McGaugh, Brown, and Davis.

It is difficult to perceive upon what grounds the judgment of the Circuit Court, in this case, was rendered. It would seem that the security, not only was relieved from his liability on the note which he had executed, but recovered damages to the amount of twenty-seven dollars and eleven cents, against the administrators.

The set-offs in this case were inadmissible. The second section of the act regulating set-offs provides, that in suits brought by administrators and executors, debts existing against their intestates or testators, and belonging to the defendant at the time of their death, may be set off in the same manner as if the action had been brought by and in the name of the deceased.

This section was only designed to be applicable in suits brought by executors and administrators for a cause of action accruing in the life-time of the testator or intestate.

To allow such set-offs in actions brought by administrators or executors, on a cause of action accruing to them, as executors or administrators, since the death of the testator or intestate, would contravene the policy of the law regulating the distribution of estates.

It would place it in the power of a creditor to control the order in which assets are directed to be administered, and enable him, by purchasing property at the sale of decedent's effects, to pay himself, to the prejudice of creditors entitled to priority.

The plea of McGaugh being withdrawn, and a judgment against him by *nil dicit*, the judgment in favor of Brown, the co-defendant, appears unauthorized by any thing on the record. Assuming that the representations and promises of Woodward released Brown from his liability as surety, it is not perceived how that could entitle him to a recovery of twenty-seven dollars and eleven cents.

The representations of Woodward were, however, inadmissible. Where a contract is reduced to writing, the presumption of law is, that the writing contains the whole contract. Here is a promise to pay, on a day specified, a certain sum of money, for value received, and the obligor offers to prove that there was an understanding and agreement between him and the obligee, that the obligee would not hold him responsible on that promise. For this is the amount of the conversation between Brown and Woodward on that subject. This would be to permit a party to contradict his written agreement.—*Curtis vs. Wakefield*, 15 Pick. Rep., 437.

Judgment reversed, and cause remanded.

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WHITNEY vs. THE STATE.

1. The only reason for setting aside a verdict where a separation of the jury has taken place, is, that the jury have been tampered with, or might have been tampered with; but where the record precludes any such supposition, the verdict will not be set aside merely because one of the jury, without the permission of the court, absented himself from the other jurors for a short time.
2. Where there is any evidence having a tendency to establish a certain fact, the jury are to judge of its strength and sufficiency, and it is erroneous to instruct the jury, under such circumstances, that there is no evidence to establish such fact.
3. The defendant was indicted for horse-stealing, and his declarations were given in evidence against him. The defendant offered to prove, "that when engaged in horse-trading he was in the habit of drinking, and when in liquor was in the habit of telling inconsistent and false tales as to the manner in which he obtained his horses." *Held:* That such evidence of defendant's vicious habits of drunkenness and falsehood was properly excluded.

APPEAL from Howard Circuit Court.

LEONARD and DAVIS, for Appellant.

The counsel of Whitney insist that the Circuit Court ought to have set aside the verdict, and granted a new trial, for the following reasons, to wit:—

1. Because the verdict was against the instructions of the court.
2. Because the verdict was against the third and fourth instructions given by the court, on the part of Whitney.
3. Because the court erred in giving the fifth instruction asked on the part of the State.
4. Because a member of the jury separated himself from his fellows for more than one half hour, and went out of town without the consent of the court or the defendant, and not attended by an officer of the court: as to this point, see 7 Cowen, 221; 2 Leigh, 750.
5. Because the evidence offered by the defendant to prove that he was drinking at the several times when he made the contradictory statements, as to the manner he became possessed of the horse, and his usual manner of talking upon horse trades, was excluded by the court as evidence to the jury.
6. Because the court refused to give the 6th, 7th, 8th, and 9th instructions asked by the accused.

GORDON, Circuit Attorney, for the State.

1. The court committed no error in giving the instructions asked for on the part of the State. The three first and sixth instructions on the part of the State were given in reference to the first and second counts of the indictment, upon both of which the jury found the defendant not guilty, he therefore cannot com-

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plain that the court misdirected the jury in relation to the two first counts, but should the court think it proper to look into said instructions, then, I contend, that the law was well laid down by the court.—2 *Rus. on Crimes*, side-paging, 177, same book, 666; *Barbour's Crim. Treatise*, 173, 4.

2. The court correctly refused the 6th, 7th, 8th, and 9th instructions asked by the defendant, for the reason that said instructions are based upon a partial statement of the facts, and not upon the entire facts of the case.—9 *Peters' Reports*, 292, 418.

3. The facts upon which said instructions are based, are evidence from which the jury had a right to infer the guilt of the defendant.

4. There is no cause shown, in the affidavit of M. A. Ford, for a new trial.—1 *Cow. Rep.*, 221; 3 *Cow. Rep.*, 355; *The People vs. Douglass*, 4 *Cow. Rep.*, 26; 2 *B. & A.*, 462; 1 *Chit. Rep.*, 401.

5. The fact of the horse being stolen, and a few days afterwards found in the possession of the defendant, is sufficient evidence that he stole him, and it devolved upon him to prove that he did not steal him; (2 *Rus. on Crimes*, 177, side-paging; 2 *Starkie's Ev.*, 450;) and the fact that the defendant gave no evidence of good character, was good evidence that he was a man of bad character.—12 *Wendall's Rep.*, 78.

6. The court properly refused to permit the defendant to prove that he was in the habit of telling lies when trading and drinking.

7. The court properly overruled the motion for a new trial.

NAPTON, J., delivered the opinion of the Court.

The appellant, together with one Coleman Whitney, was indicted by the grand jury of Howard county, for stealing a horse. The indictment contained three counts; the first, charging the defendants with stealing the horse; the second, charging that some person unknown stole the horse, and that the defendants received the horse, knowing him to have been stolen; and the third count, charging that Coleman Whitney, one of the defendants, stole the horse, and that the appellant, Wade H., received the same, knowing him to have been stolen.

Coleman Whitney was not served with process: the appellant pleaded not guilty, and after a trial, was convicted on the third count, and his punishment assessed to two years' imprisonment in the penitentiary.

A bill of exceptions, preserving all the evidence, is on the record. It appears, that in the Fall of the year 1839, a negro man belonging to one Arthur Culton, a citizen of Washington county in this State, was, with his master's permission, on a visit to his wife, then living with John Whitney, in Howard county, the son and near neighbor of the appellant. The negro man had rode his master's horse, and placed him in said John Whitney's stable, from which he was taken in the latter part of September. Shortly after the horse was taken, Coleman Whitney, another son of appellant, was seen in possession of the horse, riding in the direction towards Macon county; in the afternoon of the same day, the appellant started to Macon county, on pretence of business, and was seen about five miles from home

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in possession of the same horse. The appellant took the horse to Macon county, which is about forty miles from his residence, where he traded him off, after several ineffectual attempts to sell. It appears, that appellant, at Macon county, as well as elsewhere, made divers false statements as to the time, place and manner, in which he got possession of said horse. It appeared also, that appellant was drinking when he was attempting to trade the horse in Macon county.

During the examination of the witnesses, the appellant offered to prove, that when engaged in horse trading, he was in the habit of drinking; and when in liquor, was in the habit of telling inconsistent and false tales as to the manner in which he obtained his horses, but the court would not allow the testimony.

It appears, from the bill of exceptions, that the jury, having returned an informal and insufficient verdict, was directed by the court to return to their room and consider of their verdict; which they did, and afterwards returned a verdict, which was received by the court. It appears, that after the jury had first returned, as above stated, and when they were remanded into the jury room, one of the jurors separated himself from the jury, by going out of the court-house, and going homewards for the distance of upwards a half a mile, without the consent of the defendant or leave of the court, and without being attended by any officer, and was so absent, as aforesaid, for the space of about half an hour.

The court, at the instance of the prosecuting attorney, instructed the jury, that if they found that the horse was taken out of the possession of Culton's negro man, without the knowledge or consent of Culton or the negro, they might infer from that fact that the horse was stolen, and if he was in a short time afterwards found in the possession of Coleman Whitney, and said Whitney did not explain the manner in which he obtained possession of said horse, they might presume that he stole him; and if they further found, that Wade H. Whitney received the horse of said Coleman, knowing him to have been stolen, they would find Wade H. Whitney guilty under the third count. The court also, on behalf of the defendant, instructed the jury, that "there was no evidence that the horse was taken out of the possession of Culton's slave without the knowledge or consent of the slave." Several other instructions were given, the propriety of which is not questioned here.

After verdict, a motion was made for a new trial, upon several grounds. The two principal reasons assigned, and insisted on here, were, that the facts did not authorize the verdict, under the instructions given by the court, and because of the separation of a juror, without consent of the court. The new trial was not granted, and the refusal of the court to grant one is assigned for error.

Whether the mere separation of the jury, in a criminal prosecution, is of itself, without any misconduct in the jury, sufficient to set aside the verdict, is a question which has not been authoritatively settled. In civil suits and prosecutions for misdemeanors, it appears to be well settled in England, that the separation of the jury is not sufficient to authorize the court to set aside the verdict. Greater strictness prevailed in ancient times; but in the case of *The King vs. Woolf and Others*, (1 Chitty, 401,) the subject was much considered by the Court of King's Bench, and the authorities examined, and all the court refused to set aside a ver-

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dict in a prosecution for a misdemeanor, because of a separation of the jury with the permission of the court. It was also held in that case, that it can make no difference whether the separation is by consent of the court or not, so far as the rights of the defendant were concerned. The doctrine in *King vs. Woolfolk* was applied, by the Court of Errors in New York, to cases of felony, in *The People vs. Douglass*; (4 Cowen, 23;) but in Virginia, the Court of Appeals, in the case of *Commonwealth vs. McCaul*, (Virginia Cases, 271,) seemed inclined to adopt the stricter rule. To lay down any general rule, applicable to all cases, would, perhaps, be difficult; at all events, it is unnecessary in this case, where, I think, the principle has no application whatever. The only reason for setting aside a verdict, where a separation of the jury has taken place, is either that the jury have been tampered with, or might have been tampered with. Here the record precludes any such supposition. It appears, that the verdict had been reported, finding the defendant guilty, and inflicted his punishment before the juror absented himself: and when the verdict was finally rendered in proper form, it was not different from the former verdict, so far as the rights of the appellant were concerned. The separation of the juror was purely accidental, and could not, by any possibility, have any influence on the verdict. It would be going further than any case I have seen, if the court would set aside this verdict for such a cause.

The refusal of the court to permit the appellant to give proof of his vicious habits of drunkenness and falsehood, we are of opinion, was correct.

The instruction given by the court, at the instance of appellant, that there was no proof that the horse was taken out of the possession of Culton's slave without the knowledge or consent of such slave, was erroneous. There is no obligation on a court to give such instructions. If any evidence was offered, having a tendency to establish that fact, the jury were to judge of the strength of such evidence and its sufficiency. In this case there were certainly facts in proof, from which a jury might have inferred that the horse was stolen, and so the court had very properly told the jury. Whether the slave of Culton was privy to the larceny or not, was a matter of no sort of consequence. The jury was to judge from all the circumstances attending the transaction, whether this was a felonious taking or not; and the total absence of any evidence on the part of the appellant to account for his possession of the horse, and his contradictory statements, relative to the person from whom he obtained him, (in no one of which, however, was there any pretence of having obtained him from Culton's slave,) were circumstances from which a jury were well warranted in finding the verdict which they did. Whilst the State might complain of this instruction, the appellant cannot. It placed his case in a more favorable light before the jury than the facts in evidence justified. The judgment of the court will therefore be affirmed.

MILLER vs. WOODWARD AND THORNTON, ADMINISTRATORS.

In Chancery.—The bill set forth, that in 1836, complainant and others became the securities of one M. in his official bond, as collector of the revenue; that M. died in 1837, insolvent, and that defendants administered on his estate, and have still in their hands the greater part of the assets; that, in 1841, complainant was sued on said bond, and that the State recovered judgment against him, as such security, for two hundred and sixty-four dollars, all of which he was compelled to pay, as his co-securities were insolvent; that said suit was not commenced until after the lapse of three years from the date of the letters of administration, &c.

The bill prayed for an injunction restraining the administrators from making distribution, and that they be decreed to pay over to complainant the amount paid by him to the State. *Held:*

1. That, under the 15th section of the act of March 7th, 1835, concerning courts, (R. S. 1835, p. 156,) the County Court has exclusive original jurisdiction over all the matters detailed in the first six clauses of that section, concurrent jurisdiction with the Circuit Court in the cases enumerated in the seventh clause, and exclusive original jurisdiction or power to perform the various acts specified in the last five clauses. The decision of this Court, in *Erwin vs. Henry*, (5 Mo. Rep., p. 469,) that the exclusive original jurisdiction of the County Court extended only to the cases enumerated in the first clause of said section, and that courts of chancery and the county courts had concurrent jurisdiction in the cases enumerated in the remaining clauses of said section, is therefore overruled.
2. That the general control over executors and administrators, given to the circuit courts by the sixth clause of the eighth article of said act concerning courts, is limited in its application to such cases as are not specifically provided for in other parts of the same act, and the act concerning administration.
3. That the right of a security to recover from his principal the amount which he has paid in his behalf, is a right which may be established in a court of law; but his right to stand in the place of the creditor as to all securities, funds, liens, and equities which he may have for the same debt, is a right which can only be established in a court of equity.
4. That courts of equity have jurisdiction in this and similar cases, in which sureties wish to avail themselves of every advantage which the creditor had against their principal. The amount involved places this case within the concurrent jurisdiction of the county and circuit courts, and the demand being purely equitable, it falls to the Chancery side of the Circuit Court.
5. That, as the complainant's cause of action did not accrue until the lapse of three years after the granting of letters of administration to defendants, he was not barred by the limitation of three years, in the administration act.

ERROR to Ray Circuit Court.

P. L. EDWARDS, for Plaintiff in Error.

1. Whenever a security pays the debt of his principal, equity will subrogate the former to all the rights and remedies of the creditor against the latter.—*Wendall vs. Van Rensselaer*, 1 Johns. C. Rep., 343; *Wiser vs. Blakely and Others*, *Ibid.*, 437; *Brown vs. Rickets*, 3 Johns. C. Rep., 553; *Hays vs. Ward*, 4 Johns. C. Rep., 123; *Finsley vs. Oliver*, 5 Munf., 419.

2. After funeral expenses and expenses of last sickness of decedents, the State is a preferred creditor, (Rev. Stat., p. 55, sec. 1,) and a security having paid a

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debt due from the deceased to the State is entitled to be subrogated to all the benefits of her priority; for the same right of priority which belongs to the Government attaches to the claim or individual who, as surety, has paid money to the Government.—*Hunter vs. The United States*, 5 Peters' Rep., 172; *Hickman vs. Hall's Administrators*, 5 Littell, 338.

3. The only question presented by the record is, whether the State, had she proceeded against the administrators, would have been entitled to priority over other creditors except those of the first and second classes. If so, it follows that all other creditors will be postponed to the surety who has paid the debt at her suit.—*Parks and Others vs. The State*, 7 Mo. Rep., 194; see *Wheeler's American Chan. Dig.*, title, "Prin. and Surety," p. 486, vol. 2.

4. The complainant was entitled to a decree, for assets might yet come to hands of the administrators: surely he cannot be prevented from establishing his claim.

DUNN, for Defendants in Error.

1. A court of equity has, in general, no jurisdiction where a plain, adequate and complete remedy exists at law.—*Mitf. Chan. Plead.*, 26, note; *Rev. Stat.*, 155, sec. 8.

2. The complainant should have presented his demand for allowance to the County Court.—*Rev. Stat.* 55, art. 4.

3. The priority given to the State in the administration of the assets of the estate is a plain legal right.—*Rev. Stat.*, 55, sec. 1.

4. The State must have enforced that right at law, and if the complainant, upon the payment of the money, occupies the same ground, his remedy is at law.

5. The creditors whose demands have been allowed by the County Court have a vested legal interest in the estate, which it would be inequitable to take from them.

6. The complainant having failed to exhibit his claim for allowance within three years, his remedy at law is barred by the statute of limitations.—*Rev. Stat.*, 55, section 2.

7. And although the statutes of limitations are, in their terms, applicable to courts of law only, yet equity acts by analogy to the rules of law, and this court will refuse relief.—1 *Story's Equity*, 73, sec. 55; 3 *Marsh. Rep.*, 223.

8. It will not take a case out of the statute that the cause of action did not come to the knowledge of the party until the limitation had expired.—5 *Mo. Rep.*, 454.

9. It was the duty of the complainant to have looked after his principal, and if he was apprehensive of loss, to have sought relief from future liability.—*Rev. Code*, 575; 7 *Mo. Rep.*, 196.

10. As soon as the collector made default, the complainant, his security, could have compelled the State to collect the debt from the principal.—1 *Story's Equity*, 322, sec. 327.

11. If the complainant is entitled to the priority which the State held, still the maxim, *Nullum tempus occurrit reipublicæ*, is applicable to the State only.—*Ballantine on Limitations*, 18; 4 *Bibl's Rep.*, 62; 9 *Wheat. Rep.*, 737.

NAPTON, Judge, delivered the opinion of the Court.

This was a bill in chancery, filed by the plaintiff in error against Woodward & Thornton, administrators of the estate of William W. Mauzey, deceased, and John S. Wilkerson, James S. Ball, and others, creditors of said estate. The bill alleges, that in the year 1836, the complainant, in connection with three others, became securities in a collector's bond for William W. Mauzey, in the penal sum of ten thousand dollars, conditioned for the faithful performance of his duties in that office; that, in 1837, Mauzey died intestate, and defendants, Woodward & Thornton, administered upon his estate; that the greater portion of the assets were yet in the hands of said administrators, and no final settlement had been made; that the estate is insolvent, and will not pay fifty cents in the dollar on the demands against it; that the County Court of Ray county had ordered distribution of such moneys as were in the hands of said administrators to be made among the creditors, paying on all debts in class No. 5, thirty seven and a half cents in the dollar.

The bill further charges, that in April, 1841, suit was instituted by the State of Missouri against the complainant and other securities of Mauzey, on said collector's bond, and judgment obtained for two hundred and sixty-four dollars, which suit was not commenced until more than three years had elapsed from the date of the letters of administration.

The bill charges, that complainant paid the whole amount of this judgment, and that his co-securities are insolvent.

The bill prays for an injunction restraining the administrators from making distribution, and that they be decreed to pay over to complainant the amount paid by him to the State.

To this bill defendants demurred generally: the demurrer was sustained by the Circuit Court.

How far courts of chancery in this State have original jurisdiction in matters relating to the administration of estates, is a question which the various and apparently conflicting provisions of our statutes have very much embarrassed.

The subject was very much investigated by this Court in the case of *Erwin vs. Henry*, (5 Mo. Rep.,) and a majority of the court in that case, in construing the 15th section of the act to establish courts of record, and prescribe their power and duties, determined, that the words, "exclusive original jurisdiction," should not be extended beyond the first clause of that section, and consequently inferred that courts of chancery and the county courts had concurrent jurisdiction in the cases enumerated in the remaining clauses of the section. This appears to have been a hasty and unwarranted reading of the section.

That section embodies in its twelve clauses the various powers and duties of the County Court; it declares that this court shall have exclusive original jurisdiction over all the matters detailed in the first six clauses, concurrent jurisdiction with the Circuit Court in the cases enumerated in the seventh clause, and exclusive original jurisdiction, or, (to use more appropriate phraseology,) power to perform the various acts specified in the five last clauses. This is plain, by a proper grammatical construction of the section, which requires the words, "exclusive

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original jurisdiction," to be understood in all the clauses except the seventh, (where the words, "concurrent jurisdiction," are used,) and is made plainer by reference to the act in the Revised Code of 1825, *in pari materia*. The provision, as it stands in the Revised Code of '35, is substantially a copy of the former law: with a view to brevity and perspicuity, it is merely divided into clauses, and its phraseology slightly altered.

The section, as it is found in the Revised Code of 1825, is thus: "The several courts of probate shall have exclusive original jurisdiction in all cases relative to the probate of last wills and testaments, the granting letters testamentary and of administration, and repealing the same, appointing or displacing guardians of orphans, minors, and persons of unsound mind, in binding out apprentices, in the settlement and allowance of accounts of executors, administrators, and guardians; to hear and determine all disputes and controversies whatsoever in relation to wills, the right of executorship, administration or guardianship, or respecting the duties or accounts of executors, administrators or guardians, and disputes and controversies between masters and their apprentices; to hear and determine all suits and other proceedings instituted against executors and administrators, upon any demand against the estate of their testator or intestate, when such demand shall not exceed two hundred dollars, and concurrent jurisdiction with the Circuit Court, where the demand shall exceed that sum, subject to appeal in all cases, &c. They shall have power to amend process, and cause to come before them," &c.—proceeding to enumerate the matters specified in the eighth and subsequent clauses of the 15th section of the act of 1835. It will be seen, that there is no essential difference between the two sections, except as to the amount necessary to give jurisdiction to the Circuit Court, and the verbal alterations appear to have been solely with a view to classify and to strip the act of verbiage. A comparison of the two acts places, we think, beyond all reasonable doubt, the inference, that the Legislature, in adopting the phraseology of the act of 1835, had no intention of substantially altering the distribution of the subjects of jurisdiction appertaining to the County Court, and that, consequently, that court was invested with exclusive original jurisdiction in all the cases enumerated in that section, except the seventh.

So far, then, as the fifteenth section of this statute is concerned, there appears to be no difficulty in establishing the nature and extent of the jurisdiction of the County Court. But the sixth clause of the eighth section of the same act gives to the Circuit Court "a general control over executors, administrators, guardians, minors, idiots, lunatics and persons of unsound mind," and they are directed "to proceed therein according to the rules, usages and practice of courts of equity." This is a very indefinite grant of power, or definition of jurisdiction, and it must be confessed, that to fix upon it a proper and reasonable construction, is not without its difficulties. If the section were alone on the statute book, and disconnected from the fifteenth section heretofore alluded to, its meaning would be obvious. The "*rules, usages, and practice*" of the English chancery courts, in their exercise of control over executors and administrators, are as well defined and established as any other branch of equity and common law jurisprudence. This head of equity, as may be seen by reference to English and American authorities, comprehends

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almost the entire field of jurisdiction occupied by our administration act, and by that act apportioned to the County Court. Legatees could establish their legacies; creditors could compel a settlement and account of the assets; and the administrator himself would go into a court of equity, and institute a suit against the creditors generally, for the purpose of having their claims adjusted, and a final decree, settling the order and payment of the assets. Courts of equity, in England and in those States where the equity jurisprudence of England has been adopted, have, at the instance of a legatee or curator, taken the entire settlement of the estate from the ecclesiastical or probate courts; and in point of practice, where the estate is large and anywise involved, it is usually settled by a master in chancery, to the entire exclusion of the probate court. To adopt, therefore, the usages and practice of the English courts of chancery, *in extremo*, would be to render our chancery courts and county courts *concurrent* tribunals, in all matters relating to the settlement of estates.

The history of the origin and growth of this jurisdiction in England is sufficient, apart from the positive enactments of the statute, to show, that the reasons which called it into existence do not require its exercise here. Judge Story, in his treatise on this branch of equity, (Story on Equity, 505,) disavows the idea, that the sole ground of this extensive jurisdiction results from the duty of that court to enforce the execution of trusts; for if this were the true ground, it would follow, that instead of concurrent, it would have exclusive jurisdiction. The true ground assumed and acted on in England was, that in all the cases in which they would take cognizance, the remedy at law either did not exist at all, or was not "plain, adequate, and complete."

From the examination of the reasons by which Judge Story, in his treatise on this subject, justifies the gradual attainment of this extensive jurisdiction by the chancery courts in England, and in those of the United States where the English system has prevailed, it will be seen, that all this power in the chancery courts grew out of the same jurisdiction of the ecclesiastical courts. Those courts, in the first place, had no means of enforcing a discovery of assets, and no power to marshal the assets on equitable principles, and, indeed, no way of reaching what in England were termed equitable assets. The second chapter of our administration act makes ample provision on this subject. The administrator or executor must make inventories of all the decedent's property, under oath, and if a suspicion arises, that any one has concealed or embezzled any of it, the individual charged with such concealment or embezzlement may be cited before the County Court, and compelled to answer.—See the act, ch. 2, sec. 9, 10, 11.

I do not undertake to say, that all the distinctions between legal and equitable assets are destroyed by our act, but it is certain, that the whole doctrine of marshalling assets has no application here, in cases of intestacy; and even in case of a will, it is not easy to conjecture an instance in which a court of equity would, on that ground solely, have a right to interfere.

No power of giving preferences is reserved to the administrator: under the direction of the County Court, the assets are distributed to the creditors *pari passu*; and the precise order for the payment of debts, legacies, &c., is pointed

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out in the statute, and is not founded on any supposed dignity of debts which existed at common law. What occasion can there be for marshalling assets here, when bond creditors and simple contract creditors are all on a footing, except so far as superior diligence creates a preference?—2 Fonbl. Eq., b. 4, ch. 3; 1 Story Eq., 510.

In the next place, the ordinary courts could not compel the executor or administrator to prove the items of his account, or swear to its correctness. This is amply provided for in our administration act. Before the act of descents and distributions, it was also doubtful whether an administrator could be compelled to make any distribution of an intestate's estate. Where payment of a legacy was pleaded, the ecclesiastical courts required two witnesses; executors were entitled to the residue; and legatees could not be compelled to give refunding bonds: so that, Judge Story says, "practically speaking, in cases of any complication or difficulty, the court of chancery has acquired almost an exclusive jurisdiction."—Story's Eq., p. —.

In relation to legacies, the English courts of chancery have acquired, in many instances, an exclusive jurisdiction. This was assumed on the ground, that the executor was a trustee for the benefit of legatees, and, therefore, as a matter of trust, legacies were within the cognizance of that court. It was also claimed as incident to discovery and account, and lastly, because of the want of any adequate and complete remedy elsewhere. Upon this last ground, courts of chancery, in cases of legacies to married women and infants, and bequests involving the execution of a trust, have claimed and exercised exclusive jurisdiction, by enjoining the ecclesiastical courts from proceeding at all, and settling the whole matter in chancery.

It is thus seen, that the principal reason given by the equity courts of England for their assumption of such extensive jurisdiction, both concurrent and exclusive, over executors and administrators, and the settlement of estates, has been for the want of an efficient and adequate remedy at law. These defects, it is also seen, in the power of the English ecclesiastical courts, do not, to any extent, exist in the organization or powers of our courts of probate. It is true, that where courts of equity have once acquired jurisdiction, in consequence of the want of remedy elsewhere, the subsequent provision of a remedy by the legislative department has been held not to divest chancery of its jurisdiction, unless exclusive words are used in the act. It is better to increase the jurisdiction of courts, than to limit them; for thereby a choice of tribunals is left to suitors. But the principle has no application in this case; for the legislature have used, as we have seen, exclusive words, and the county courts and courts of chancery cannot be concurrent, except so far as they are made concurrent by the seventh clause of the fifteenth section.

By that section, it has been seen, that the circuit courts have concurrent jurisdiction with the county courts in all suits against executors and administrators, where the demand exceeds one hundred dollars. The Circuit Court has both common law and chancery jurisdiction, and where the demand is an equitable

one, there can be no doubt that, under this provision, the Circuit Court will take cognizance of such demand, as a court of equity.

The provisions of the act concerning administration evidently contemplate this exercise of jurisdiction, for the seventh section of article 4, p. 56, provides, "that any person having any demand against an estate, may establish the same by the judgment or decree of some court of record, in the ordinary course of proceedings, and exhibit a copy of such judgment, whether rendered before or after the death of the deceased, to the County Court."

It is apparent, then, from an examination of the different provision of our acts, that the general control over executors and administrators, given by the sixth clause of the eighth section of the act concerning courts, must be limited in its application to such cases as are not provided for in the more specific distribution of equity jurisdiction, to be found both in our act concerning administration, and in the act defining the jurisdiction and powers of the county and circuit courts. The clause appears to have been inserted through abundant caution. The legislature, notwithstanding the care with which they had devised, in the law of administration, suitable modes by which estates could be settled without the aid of courts of equity, except where the intervention of such court was expressly authorized, thought proper to invest the courts of equity with this general control over executors and administrators, to be exercised where the remedy at law was still inadequate.

The right of a surety to recover from his principal the amount which he has paid in his behalf, is a right which may be established in a court of law; but his right to stand in the place of the creditor, as to all securities, funds, liens, and equities which he may have, is a right which can only be established in a court of equity. In *Wright vs. Morley*, (11 Vesey, 22,) the doctrine is thus stated by the master of the rolls: "I conceive, that, as the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor." In *Parsons vs. Briddock* (2 Vern., 60,) it was established, that the surety had precisely the same right that the creditor had, and was to stand in his place. In *Cheeseborough vs. Milland*, (1 Johns. Ch. Rep., 403,) the chancellor says:—"If the creditor to a bond exacts his whole demand of one of the sureties, that surety is entitled to be substituted in his place, and to a cession of his rights and securities, as if he was a purchaser either against the principal debtor or his co-securities." In *Hays vs. Ward*, (4 Johns. Ch. Rep., 123,) it was again said:—"It is a settled principle in the English chancery, that a surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security, and to stand in the place of the creditor, and have his securities transferred to him, and to avail himself of those securities against the debtor. This right of the surety stands not upon contract, but upon the same principle of natural justice upon which one surety is entitled to contribution from another."

There can be no question but that courts of equity have jurisdiction in this and similar cases, in which sureties wish to avail themselves of every advantage which the creditor had against their principal. The amount involved places the

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case within the concurrent jurisdictions of the county and circuit courts, and the demand being purely equitable, it falls to the Chancery side of the Circuit Court.

The statute of limitations is no bar to this demand, whether suit be instituted in the County Court or a Court of Chancery. Our act provides, that all demands not presented against an estate within three years, shall be forever barred; but this statutory provision was not designed to work the gross injustice of barring demands against an estate which never accrued until after the expiration of the three years. Suppose the testator had executed in his life a deed with covenants, and a breach of the covenant happens more than three years after his death, would an action for such breach be barred? Here the cause of action did not accrue until the three years had elapsed, for, until the complainant had paid the judgment against Mauzey's estate, he had no right of action.

The decree of the Circuit Court of Ray county, dismissing the bill of complainant, will therefore be reversed, and the cause remanded, and that court will proceed with the case in conformity to this opinion.

SCOTT, J., dissenting.

I do not concur in so much of this opinion as maintains, that a court of equity had jurisdiction to establish the demand of the appellant against the estate of Mauzey. The demand of the appellant was purely a legal one.

When this claim was established, then the right to substitution accrued. Until this was done, a court of equity could not know whether he had a claim or not. His demand was unliquidated and unascertained, and he could with no propriety ask to be substituted for the State, when it did not appear that he had any demand established against the estate of the deceased.

It was asking a court of equity to entertain jurisdiction of a matter exclusively cognizable at law. It is like the case of a legal creditor coming into a court of equity, for its assistance in the collection of a debt, before he had recovered judgment at law, and issued an execution. Every person having any demand against an estate, may establish the same by the judgment or decree of some court of record, in the ordinary course of proceedings. This demand exceeding one hundred dollars, the County Court and Circuit Court had concurrent jurisdiction over it, and the party might have established it in either court.

It is, however, a legal demand, and if he goes into the Circuit Court, he must take the common law side of that court. If a creditor having a legal demand against a debtor, foresees there will be a difficulty in the collection which will render the aid of a Court of Chancery necessary, would that authorize him to come into equity in the first instance, and there have his demand matured into a judgment? Would not that court refuse its assistance until he had obtained his judgment and execution at law? What is the difference between these cases? Whether the appellant has a claim against the estate of the intestate, is a matter to be determined in a court of law; whether that claim shall be substituted for the claim of the State, is a question for a court of equity, and which that court

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cannot determine, until it is first ascertained at law that the demand has an existence.

The Circuit Court, then sitting as a court of chancery, did right in refusing its aid to the appellant, until he had shown that he had a right to that aid by the exhibition of a demand established at law against the estate of the deceased. The claim of the appellant did not accrue until he had actually paid the debt to the State for Mauzey. No laches can be imputed to the State, nor is she barred by any statute of limitations, unless expressly named. The State collected her demand against the deceased, from the security, three years after notice of the grant of letters of administration; the surety, then, had no claim until he actually paid the money, and could not be barred by the statute, which only extends to those having claims. If the principal in a promissory note, to which there is a surety, dies, and the creditor, relying on the surety, neglects to establish his demand against the estate of the principal, and, after the lapse of three years from the publication of notice of the grant of letters of administration, brings suit against the surety, is he barred? and if not, will not the surety be entitled to an indemnity, if he pays the debt out of the estate of the principal, notwithstanding three years may have elapsed since the granting of letters of administration? If a person enters into a covenant and dies, and there is no breach until after three years, is the covenantee barred of all recourse? I apprehend not. If the estate has been distributed, upon a bill of equity being filed, relief would be afforded.

EVANS vs. ASHLEY.

1. A sheriff's sale of real estate is within the statute of frauds and perjuries, and unless some note or memorandum of the sale is made, the sale conveys no title.
2. A certificate of purchase, under the act of June 23, 1821, entitled, "An act for the relief of debtors and creditors," must be in the name of the sheriff, and such a certificate, signed by the deputy sheriff, in his own name alone, is illegal and void.—See *Evans vs. Wilder*, 5 Mo. Rep., p. 319, S.C.; 7 *Ibid.*, 362.
3. A certificate of purchase under said act of June 23, 1821, would not, after the repeal of that act, authorize the successor of the sheriff who made the sale to execute a deed for the land to the purchaser, without an order of court for that purpose, made on application of the purchaser, in conformity with the provisions of the act of 1807 concerning practice at law.
4. H. being the owner of 12½ arpens of land adjoining the city of St. Louis, laid the same off into town lots, and sold six of said lots to P., who had formerly been the owner of the whole tract. Under a judgment against P., obtained after the sale of the tract, and after its subdivision into town lots, the sheriff levied upon the whole tract, describing it in his advertisement as "12½ arpens of land adjoining St. Louis," &c., and sold the whole tract, and executed a deed to the purchaser for the same, describing it in the same manner as in the advertisement. At the time of this sale, P. had no other interest in the tract than his six lots. *Held*: That the description of the interest of P. in the tract was too vague and uncertain, and the sale and conveyance were therefore void.

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5. Where a person owns several lots in a town, laid off on a particular tract of land, the sheriff cannot sell his interest in those lots, by an advertisement offering for sale the whole tract on which the town was laid off. Such a description is altogether too vague and uncertain.
6. The certificate of purchase given by the sheriff, under said act of 28th June, 1821, to the purchaser of land sold under execution, is a sufficient note or memorandum to take the sale out of the operation of the statute of frauds, but does not convey any title to the purchaser, and under such certificate the purchaser cannot maintain or defend in ejectment.

ERROR to the St. Louis Circuit Court.

GEYER, for Plaintiff in Error.

The plaintiff in error submits that the instructions ought to have been given, and being refused, the judgment ought to be reversed, for the following reasons:—

1. The advertisement under which the sale was made is insufficient, in that it does not state with sufficient precision where and at what time the sale is to be made.—Geyer's Dig., 268.
2. The certificate of J. C. Brown, of the sale to Paul Anderson, varies in the description of the property sold; and does not show when, where, or how the sale was made.—Geyer's Dig., 268.
3. It nowhere appears that the sale was made, as the law requires, at the Court-house door of the county of St. Louis, on some day during the term of the Circuit Court of that county.
4. The description in the advertisement, certificate, and deed of the six lots, is not such as to pass the title to said lots; said Price holding them at the time in severalty, and having no interest in any other part of the land included within the boundaries of the tract described.—Jackson ex dem. Livingston vs. Delany, 13 Johns. Rep., 537; Jackson ex dem. Carman vs. Rosevelt, *Ibid.*, 97.
5. The sheriff, Walker, had no power to make a deed for land sold by his predecessor, without an order of the court previously made, on application by the purchaser, and proof of the facts entitling such person to a deed.—Geyer's Dig., 269; Rev. Code, 1825, 370; Acts June session, 1821, ch. 32, November session, p. 101; Bissell vs. Payne, 20 Johns. Rep., p. 3.

ALLEN, for Defendant in Error.

It is insisted that, upon the whole record, the judgment of the court below was correct.

1. The representative of Anderson, the purchaser at sheriff's sale, being in possession, and having a certificate of purchase, is entitled to that possession against all who cannot show a paramount title.
2. The title was in Anderson by the certificate, or the certificate and deed after the time for redemption had expired, and his representative being in possession, the plaintiff could not eject him.—Fenwick vs. Floyd's Lessee, 1 Harris and Gill, 172; Simonds vs. Catlin, 2 Caine's Rep., 60.

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3. That, on the day of the rendition of the judgment, and on which the sheriff sold these lots to Darby, Price had no title, nor at the time of the sale had he any title subject to sale on execution.

It is further insisted, that there is no error in the refusal to give the first instruction asked by the plaintiff.

It is further insisted, that there is no error in the refusal to give the second instruction:—

1st. Because there is no evidence to show that O'Hara had laid out the land into town lots and streets.

2d. Because the land, as advertised, was sufficiently certain.

SCOTT, Judge, delivered the opinion of the Court.

This was an action of ejectment, brought by the plaintiff against the defendant in error, for six lots in O'Hara's Addition to St. Louis, making together one hundred and eighty feet by eighty feet: plea, not guilty; on which there was a verdict and judgment for the defendant; to reverse which, the plaintiff prosecutes this writ of error. The following are the facts, as they appear from the bill of exceptions:—Risdon H. Price, being the owner of $12\frac{1}{2}$ arpens of land, of which the lots mentioned in the declaration were a part, conveyed, on the 16th March, 1820, one undivided half of the same to William M. O'Hara. This deed was recorded on the 17th May, 1820. On the 1st September of the same year, the said Price conveyed the other half of the said tract of land to the said O'Hara. This deed was recorded on the 20th October following.

On the 1st September, 1820, the said O'Hara conveyed to the said Price the six lots in the declaration mentioned, situate at the upper end of the town of St. Louis, being parts of a tract of land conveyed to O'Hara by Price, as aforesaid, and described on a map annexed to the deed of conveyance, as lots Nos. 82, 83, 84, 85, 86, 87, which lots are each thirty feet wide, and eighty feet deep. This conveyance was recorded on the 20th November, 1827.

In August, 1829, A. H. Evans recovered, in the St. Louis Circuit Court, a judgment against Risdon H. Price, above named, on which, on the 12th January, 1832, an execution issued, by virtue of which the said six lots were sold to J. F. Darby, to whom, on the 16th April following, the sheriff executed a deed for the same. Darby, on the 20th August, 1832, conveyed the said lots to A. H. Evans, the plaintiff in error.

The title set up by the defendant is as follows:—On the 26th December, 1820, Wm. O'Hara conveyed, by deed of that date, to Paul Anderson, the tract of $12\frac{1}{2}$ arpens above mentioned, excepting 25 lots, each thirty feet wide and eighty feet deep, before conveyed by said O'Hara, as follows:—two to F. Dent, six to R. H. Price, and fourteen to Thomas Collett. This conveyance was recorded on the 24th March, 1821. Several judgments were obtained against Risdon H. Price in the Supreme Court, and in the St. Louis Circuit Court, in the spring of the year 1821. Upon the judgments obtained in the Circuit Court, executions were issued, returnable to the August term, 1821. By virtue of these execu-

tions, and the executions from the Supreme Court, the $12\frac{1}{2}$ arpens of land before mentioned were levied upon and sold, without reservation or exception, the following being the description of the same contained in the sheriff's advertisement, viz.: " $12\frac{1}{2}$ arpens of land, near the town of St. Louis, and south of Elias Rector's, purchased of said Price of Edward Hempstead, administrator of the estate of M. Lewis, deceased." After this sale, a certificate thereof, under the act of 1821, for relief of creditors and debtors, was made. This certificate commenced thus: "I, Joseph C. Brown, sheriff of St. Louis county," &c.; and it certified that he, Brown, on the 28th day of August, 1821, exposed to sale a tract of land containing $12\frac{1}{2}$ arpens, more or less, except certain lots sold to Josiah Spalding, agent of Abraham Beck, and F. Dent, (fifteen in number,) situate above and adjoining the town of St. Louis, being the same $12\frac{1}{2}$ arpens that said Price acquired by deed from E. Hempstead, administrator of the estate of M. Lewis, deceased; and that Paul Anderson being the highest and last bidder, the same was struck off to him; and that the said Anderson would, on the 28th day of February, 1824, be entitled to a deed therefor, unless the same should be redeemed by virtue of the act of assembly, entitled, "An act for the relief of debtors and creditors." This certificate was recorded within ten days from the sale, and was signed, "John K. Walker, deputy-sheriff."

On the 20th September, 1825, John K. Walker, the then sheriff, and successor of J. C. Brown, the sheriff at the time of the sale last above-mentioned, executed a deed to Paul Anderson, for the tract of $12\frac{1}{2}$ arpens of land, excepting the fifteen lots mentioned in the said certificate. This deed was executed by Walker, without any other authority than that he possessed as sheriff, and its validity rests on the act of 1821, for the relief of debtors and creditors, or on some supposed principle empowering a succeeding sheriff to execute deeds for lands sold by his predecessor, or it is executed without authority.

The defendant derived title to the $12\frac{1}{2}$ arpens, including the lots in dispute, from Paul Anderson, by regular conveyances; and it was admitted, that she was in possession of the lots sought to be recovered by this suit, at its commencement.

The plaintiff asked the two following instructions, which were refused, and the refusal excepted to:—

1. That the deed from J. K. Walker, sheriff, to Paul Anderson, given in evidence in this case by the defendant, is inoperative, in law, to convey the lots in question, or any of them, to Paul Anderson.

2. If the jury find from the evidence, that Wm. M. O'Hara, (being the owner of the tract of land described in the deed of Walker, sheriff, to Paul Anderson, and in the certificate of sale of J. C. Brown, sheriff, to Paul Anderson) had laid off the said tract of land into town-lots and streets, and had sold to R. H. Price six of said lots, and to other persons, other of said lots; and that, at the date of the judgments against Price, under which defendant claims title, said Price was not otherwise interested in said tract of land, than as the owner of said lots, then the title claimed under the sale by the sheriff is invalid.

It was contended for the defendant, that the certificate of John Walker, deputy sheriff, is sufficient evidence of the sale, under the act for the relief of debtors

and creditors, approved 28th June, 1821; and that the deed of J. K. Walker, the successor of J. C. Brown, was sufficient to pass the title of Price to the lots, after the time of redemption had elapsed; that the execution of the deed is an official act; that the office of sheriff is a *quasi* corporation, and by analogy, the successor in the office of sheriff would seem to be the proper person or officer to consummate what his predecessor had failed or was disabled to do. No authorities are cited for this view of the subject, and the course of the argument will render a review of the case of *Evans vs. Wilder* (7 Mo. Rep, 359) necessary. It seems to be settled that a sheriff's sale of real estate is within the statute of frauds and perjuries, and unless some note or memorandum of the sale is made, the sale conveys no equitable, much less legal, title. (*Simonds vs. Catlin*, 2 Caines' Cases in Error; *Jackson vs. Catlin*, 2 Johns. Rep., 248; 8 *Ibid.*, 520.) On what principle is it attempted to support the validity of the certificate signed by the deputy sheriff? In the case of *Stewart vs. Cave*, (1 Mo. Rep., 752,) it was held, that letters of administration granted by a deputy clerk, in his own name, were void. In that case the letters were granted in the name of the deputy, and signed by him as deputy. In the case of *Post vs. Caulk*, (3 Mo. Rep, 35,) letters of administration were granted in the name of the chief clerk, and sealed with his official seal; but signed by the deputy clerk. On this state of facts, the court observed—“These letters seem to us to be only voidable, and not void; and we do not mean to say they are voidable, but at most, only so.” The court laid stress on the omission in the statute to require that the letters should be signed by the clerk. The act of 1821, above cited, required that the certificate of sale should be signed by the sheriff.

The doctrine, that a name in the body of an instrument should be deemed a signing, was first advanced on the construction of the fifth section of the third chapter of the statute of 29 Charles II., commonly called the statute of frauds and perjuries, which directed, that all devises of lands or tenements be in writing, and signed by the party devising the same. The case of *Lemayne vs. Stanley* (3 Leviwz) is the first which arose under this statute. In that case, the will was written wholly by the devisor; it was all in his own hand-writing; and from this case the doctrine, that the recital of a name in the body of an instrument is a signing, seems to have had its origin. Upon this a sensible writer remarks:—“The word *signing* conveys, to a common ear, not versed in the subtlety of technical reasoning, a mere simple idea, the writing the name of the agent at the bottom of the act, thereby formally authenticating it as his; it requires, therefore, the ingenuity of a schoolman, so far to wrest this word out of its natural sense, as to construe it to mean the recital of a name in any part of an instrument where common form or accident may happen to introduce it.” Nothing but the strong bent of the times in favor of this mode of alienation, which equally pervaded the courts of law and the people, and which had induced the loose construction of the word “writing” in the statute of wills, that rendered the statute of frauds necessary, could have given color to the argument in favor of such a construction. Lord Hardwick, commenting on the case of *Lemayne vs. Stanley*, says, “It cannot be sustained, unless you add one of two circumstances—either that the witnesses

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were present when the will was written; or, if they were not present, that the devisor acknowledged it to be his writing when he called them in to attest it." (*Morrison vs. Turnour*, 18 Ves., 183.) Chancellor Kent expresses his dissatisfaction with the rule when applied to promissory notes, and says, "Such a mode of authentication is so much out the common course, that a note wanting the usual subscription would be deemed imperfect, and it would, in point of fact, destroy its currency, and the public would very reasonably conclude, that the note had been left unfinished, and had got into circulation by fraud or mistake." (3 Kent, 78.) Powell applies the doctrine only to cases in which the will has been wholly written by the devisor. (Powell's Devises, 61, 2.) Cruise maintains the same principle, 6th vol., title, "Devise," 49. The cases under the two sections of the statute of frauds, respecting agreements, in which the doctrine has been recognized, all go upon the supposition, that if the party sought to be charged did not write the agreement himself, yet he has, by some act or in some manner, recognized the contract, and made it his own. (*Schneider vs. Norris*, 2 Maule and Selwyn, 286.) Indeed, it would be strange to contend, that an individual had personally authenticated an act which, it does not appear, he has ever heard of or seen; and because his name has been written by a third person, by way of recital, in the body of an instrument, that he, whose name is thus written, has authenticated that instrument by signing it. If the certificate was without a signature at the bottom, it might, with greater semblance of propriety, be contended that it was the act of Brown, as his name is in the body of it: but that is not the case; the instrument is signed by J. K. Walker, and not being in the name of the sheriff, his act is without authority and void.—*Simonds vs. Catlin*, 2 Caine's Cases in Error; 1 Tucker's Com., 48.

This seems distinguishable from other cases on this subject, as the instrument has been signed by another person than him whose name is in the body of it. It seems, therefore, we cannot say it was signed by any other person than him by whom it was actually subscribed.

As to the deed executed by John K. Walker, the successor of J. C. Brown, by whom the sale was made, it is urged, that, inasmuch as the terms of the 74th section of the act concerning judicial proceedings, Geyer's Digest, did not extend to the case of a sheriff whose term of service expired by limitation, there was no mode prescribed by which a purchaser could obtain a deed for land sold under execution by a sheriff, whose term of service had expired. Admitting, for argument's sake, that the 74th section of the act above cited did not empower a succeeding sheriff to execute a deed for land sold by his predecessor, whose term of service had elapsed by limitation, does it follow that the successor of the sheriff who sold the land would have the power? It is a rule, that, in order to form a right judgment, whether a case is within the equity of a statute, you should suppose the law-maker present, and propound to him this question: Did you intend to comprehend this case? Then you must give yourself such answer as you may imagine he, being an upright and reasonable man, would have given. If it be that he did mean to comprehend it, you may safely hold the case to be within the equity of the statute; for, while you do no more than he would have done,

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you do not act contrary to the statute, but in conformity thereto. (6 Bacon, 386.) Now, apply this principle of interpretation to the deed executed by the successor of J. C. Brown, the sheriff at the time of the sale of the land. If the law would not entrust the successor to the sheriff who made the sale, and who had died, to make a deed without an order on a petition filed in the Circuit Court, why should a successor to a sheriff, whose term of service had expired, be permitted to do it without such order? Is it possible to conceive any difference between the cases? As the law-maker has denied the authority to the successor, in the one case, to make a deed, without an order of the Circuit Court, can a reason be assigned why he should not deny it to the other? We confess we can see none.

If there had been no provision by law on the subject, let us inquire how the matter would have stood at common law, and ascertain whether the successor of the sheriff, whose term of service had expired, could execute a deed for lands sold by his predecessor? By the common law, an execution was an entire thing; he who began it must have ended it; and if a sheriff seized goods, and returned, that they remained in his hands *pro defectu emptorum*, and he should afterwards be removed, yet it was his duty, and not that of the new sheriff, to proceed in the execution. (6 Bacon, 161; 2 Johns. C. Rep.) And if a sheriff seized property under an execution, and died before the execution was executed, his representatives were responsible for the property sequestered. (2 Johns. C. Rep., *Mason vs. Sutam*, Dalton, 517.) This principle has been applied to sales of land under an execution.

In the case of *Allen vs. Trimble*, (4 Bibb, 21,) it was held, that a deed made by a sheriff, whose term of service had expired, for lands sold by him whilst in office, was valid.

In that case, it was objected, that the principle of the common law, above stated, grew out of the sale of chattels under execution, and should not be applied to the sale of lands. To this it was answered, it was owing to the nature of the writ, and not the description of property upon which it operated, that gave rise to this principle; and as the legislature, in subjecting lands to the payment of debts, had adopted that description of writ whose qualities gave rise to the principle, it was fair to presume it was intended that the sheriff who might take the land under a *fieri facias* should, according to this principle, sell and convey the same, though his term of office should expire before the sale or conveyance. In the case of *Jackson vs. Collins*, 3 Cowen, 95, it was held, that an execution against the property of a defendant party, executed by the old sheriff, shall be completed by him; and in relation to any such execution in the sheriff's hands, when he goes out of office, he continues sheriff, and may act by deputy as if he was still in office. In that case it was held, that a deputy-sheriff, acting in the name of his principal, may complete an execution, by sale and conveyance of lands, after the sheriff goes out of office, provided the execution was levied before.

The doctrine in the cases above cited is asserted with respect to a sale of lands, and is based on general principles, without any reference to statutory enactments. From this consideration of the subject, it is not possible to see on what ground, or by what principle, the deed of J. K. Walker can be sustained. If it is unsup-

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ported by the 74th section of the act concerning judicial proceedings, as not being executed in conformity to its provisions, and is not sustained by the principles of the common law, it must fall to the ground; for the act of 1821, before cited, was repealed at the date of the execution.

As to the question whether the land was sufficiently described in the advertisement and deed of the sheriff, we are impressed with its importance, and are aware of the consequences that may ensue from requiring too strict a description of lands sold under executions. Our opinion must operate retrospectively, and many may be disturbed in their possessions; but it is of vast importance, when a debtor's estate is exposed to sale by the law, and when the public are invited to attend that sale, that they should know what is to be sold. A satisfactory description of the premises will prevent fraud and speculation in a few who might wish to obtain large estates at a sacrifice. When an individual voluntarily conveys his estate to another, he and his vendee can make such terms, and give such conveyances, as they choose; but when the law seizes a man's land, and disposes of it for him, it ought to be done in such a manner as will produce the greatest price. Large and valuable estates may, by a loose description in a sheriff's advertisement, be sacrificed, when, if they were sufficiently described, full value might be obtained for them. A sufficient description of the lands to be sold is advantageous alike to the debtor, the creditor, and the public; to the debtor, because it enables him to pay his debt; to the creditor, for it tends to the satisfaction of his execution, which is the fruit of the law; and to the public, because it frees them from imposition. Other courts have been impressed with these considerations, and have asserted and maintained the principle with a constancy significant of its importance.

Freehold estates were not sold under a *feri facias* in England, consequently, no cases on this question can be found in English books. In the execution of the writ of elegit, given by the statute of 13 Edward I., the sheriff always set out the portion of lands allotted to the creditor by metes and bounds, which were described in his return. (Douglass, 473.) In the case of *Simonds vs. Catlin*, (2 Caine's Cases,) it was held, that a general sale by the sheriff of all that tract of land in the town of Pompey, in the tenure and occupation of the defendant, did not comport with the rule, that at sheriff's sales no property passes but what was at the time ascertained and declared. The court observed, it might as well have been all that tract of land in the county in his possession; and were of opinion, a more definite description of the situation and amount of the land, and of the quantity of the defendant's interest therein, ought to have been stated; and that the evidence of this sale, even admitting it to have been duly made by the sheriff, had not the requisite certainty. In the case of *Jackson vs. Roosevelt*, (13 Johns. Rep., 97,) it was held, that a sheriff's deed to a purchaser, under an execution, describing the premises sold no otherwise than as all the lands and tenements of the defendant situated, lying, and being in the Hardenburgh patent, was void for uncertainty. The court, in commenting on this case, observed, that the description was too general; it did not define the lots, or parts of lots, of land owned by the defendant. No estimate of the value of the lands offered for sale could be made

from this general and indefinite description, and without some definite information as to its situation, there must generally be a sacrifice of property, either by the debtor or purchaser. In most instances, if not invariably, the former would bear the loss. The officer ought to prevent such a consequence. The least that can be required of him, in making the sale, is, so to locate the lands as to afford means to the bystanders and bidders of informing themselves as to the value. The next case is that of *Jackson vs. Delaney*, (13 Johns. Rep.,) in which it was decided, that under a general cause, in a sheriff's deed, of all other lands of defendant, nothing will pass. In this latter case, the reasons of the rule are set forth with great force and vigor, and nothing is left to be added to the arguments of the court.

It was said to be altogether inadmissible, that the property of a defendant should be swept away on execution in this loose and undefined manner; it would operate as a great oppression on debtors, and lead to most odious and fraudulent speculations. No person attending a sheriff's sale can know what price to bid, or how to regulate his judgment, if there be no specific or certain designation of the property. To tolerate such judicial sales, would be a mockery of justice. It ought to be received as a sound and settled principle, that the sheriff cannot sell any land on execution, but such as the creditor can enable him to describe with reasonable certainty, so that the people, whom the law invites to such auctions, may be able to know where and what is the property they are about to purchase.

In the case now under consideration, the court below refused to instruct the jury, that if they find, from the evidence, that Wm. M. O'Hara, being the owner of the tract of land described in the deed of Walker, sheriff, to Paul Anderson, had laid off the said tract of land into town lots and streets, and had sold to R. H. Price six of said lots, and to other persons other of said lots; and that at the date of the judgments against said Price, under which the defendant claims title, said Price was not otherwise interested in said tract of land than as the owner of the said lots, then the title claimed under the sale by the sheriff is invalid.

In discussing the propriety of this instruction, the facts assumed by it must be taken to be true. If twelve and a half arpens of land are laid off into town lots and streets, and a debtor owns six of said lots, making one hundred and eighty feet in width by eighty feet in depth, is that description of his interest in the land sufficient, which represents him as the owner of the whole tract with a small exception? If a person owned several lots in a town laid off in a particular half-quarter section, could a sheriff sell his interest in those lots, by an advertisement offering for sale, as his property, the half-quarter section on which the town is laid off? Would such a description be of any avail in enabling purchasers to ascertain what was to be sold? It may be said, that the debtor could not be prejudiced by such a description, because he is represented as owning more land than he really does. But the law, in its control of this subject, looks not only to the interests of the debtor, but also to those of the people who may be induced to attend sheriff's sales, and whilst it sedulously protects the rights of debtors, it is also anxious to prevent imposition on purchasers. This case presents a singular state of facts. Price, some time before the sale, had conveyed the twelve and a half arpens to O'Hara. The conveyances by which that was effected were of

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record. O'Hara afterwards conveyed six lots, part of the said twelve and a half arpens, to Price. This deed is unrecorded. Subsequently, O'Hara aliens the said tract of land to Paul Anderson, except twenty-five lots, in which number were included the six conveyed to Price. At the sheriff's sale, Anderson becomes the purchaser, and it would seem that he alone knew that Price had any interest in the twelve and a half arpens of land, for to all others it would appear that Price had conveyed away the said tract of land to O'Hara. It is said, that the conveyance to Price for the lots was not recorded, and it could not be known what interest he had, and if too accurate a description of the premises was required under such circumstances, it would enable a debtor, by withholding his deed from record, to prevent a sale of his lands. We cannot see that much inconvenience will arise from this source. It does not appear that any efforts were made by the sheriff, or by the creditors, to ascertain what interest Price owned in the tract of land, nor but that proper inquiries would have been effectual. Instances would be rare, in which a purchaser would expose himself to the dangers resulting from an unrecorded deed, for the sake of concealing his ownership, when there are so many other modes of ascertaining the fact. But if it were necessary, would not a court of equity compel the parties to such a deed to make the necessary discovery, in analogy to the aid it frequently affords to executions at law? But could Price, by keeping his deed from record, authorize the sheriff to adopt a mode of sale which was calculated to mislead and deceive the public? If he had made inquiries to ascertain Price's interest, and failed to obtain information, why did he not state the circumstances, and make the sale in such a way as that nobody could have been deceived?

The case *Thomas vs. Turvey*, (1 Harris and Gill's Rep., 435,) has been cited by the appellee, in support of the validity of the deed now under consideration. The note of the reporter to the case is, that a levy on a tract of land, called Borough Hall, under a *fiery facias*, against one who was seized of a part of such tract, and a sale under it, will pass his interest to the purchaser. Borough Hall contained 500 acres, and the defendant in the execution owned 130 acres, part of said tract. We do not think the case warrants the inference deduced from it, or at least that it is not stated with that precision it should have been, and its defect in this particular makes it, apparently, an authority in support of the argument of the defendant. There were several executions in that case. In the schedules of appraisement, and returns of the sheriff to some of them, the defendant's interest was described as part of a tract of land called Borough Hall, containing the quantity of 130 acres, more or less. In the schedule of appraisement, and return of the sheriff to the third execution, the land was described to be a tract called Borough Hall, containing 130 acres, more or less. The first description the court held to be clearly bad, but as to the last, it was remarked, that it was in the usual form, and was upon the whole tract called Borough Hall, for which the suit was brought, and was certain and sufficient. So this case determines, that if a person is located on 130 acres of land, part of a tract of 500, known by a certain name, and the 130 acres are sold under the name and description of the whole tract, the sale is valid, because whatever may have been the quantity of the whole

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tract, only 130 acres are advertised and sold. In the case of *Fenwick vs. Floyd*, in the same book, it was held, the schedule of appraisement and return of the sheriff, showing that he had levied on part of Resurrection Manor, containing 251 acres, more or less, was too vague and uncertain, in not describing the part of the manor where the 251 acres were located, and that no location could be made under such a description.

It is further urged, by the defendant, that even if the deed of J. K. Walker was inoperative, yet the sale and certificate of the sheriff vested such title in Anderson and his representatives, as would prevail in ejectment against a person not showing a better one. The case of *Fenwick vs. Floyd*, (1 Harris and Gill's Rep.,) was cited in support of this position. This was a case decided in Maryland, and the opinion of the court leaves us in the dark as to the grounds on which it rests. Whether it was based on general principles, or on the peculiar laws of Maryland, we are not informed. It seems, however, to have been a matter well settled, as it is asserted without hesitancy, and no reason or authority alleged in its support. It has been held by this court, (*McCabe vs. Hunter's Heirs*, 7 Mo. Rep.,) that an instrument, under seal, was necessary to pass a title to real estate, since the introduction of the common law and the enactment of the statute of frauds and perjuries. The certificate of the sheriff, under the act of 1821, and the sheriff's return on the execution, when sufficiently certain, are a note or memorandum to take the sale out of the operation of the statute of frauds. They create a lien, they give a right to the land, but they do not convey title, and until title is conveyed, the purchaser cannot maintain or defend in ejectment. The statute concerning ejectment enumerates all the equitable titles on which that form of action may be maintained, and this is not one of them. (*Catlin vs. Jackson*, 8 Johns. Rep., 520; *Bissell vs. Payne*, 20 Johns. Rep., 3.) The act for the relief of debtors and creditors, approved 28th June, 1821, under which the sale was made and certificate given, certainly did not contemplate that the certificate should pass title. The fourth section of that act, in declaring the effect of the certificate, says, it shall be notice to subsequent creditors and purchasers. Indeed, to say that the certificate passes title to the purchaser, would defeat the object and policy of the act. The eighth section of the act directs that the sale shall be completed by executing a deed of the premises sold to the purchaser; an act of supererogation if the title passed by the sale and certificate. The general law passed on the subject of executions, in force at that time, (*Geyer's Digest*, "Judicial Proceedings," sec. 66, p. 267,) rendered a deed necessary for passing to the purchaser the estate and interest which the debtor had in lands sold under execution.

As to the point made, that Price had no title on the day of the rendition of the judgment, under which the plaintiff claims through Darby, the land having been previously purchased by Anderson, under whom the defendant claimed; it will be sufficient to observe, that the point made assumes that all the other points in the case are for the defendant.

We are of opinion the court erred in refusing the instructions asked by the plaintiff, and therefore reverse the judgment, and remand the cause.

*McNair et al. vs. O'Fallon et al.*MCNAIR ET AL. *vs.* O'FALLON ET AL.

A. being indebted to B. in the sum of 5,500 dollars, on the 26th January, 1820, executed to him his bond for that sum, payable one year after date, secured by mortgage on certain real estate of A. On the 30th November, 1820, A. executed another bond to B. for the payment of 500 dollars at one year, secured by mortgage on same property. On the 17th April, 1821, A. mortgaged to B. certain other real estate, to secure the payment of the further sum of 3,951 dollars.

B., in 1823, commenced suit against A. on the first-mentioned bond, and in 1824 recovered judgment against him for the amount thereof; and under said judgment all the real estate in the first-mentioned mortgage, and all the real estate in the last-mentioned mortgage, situate in St. Louis county, were sold by the sheriff, and, with the exception of one lot, purchased by B., for the sum of 2,700 dollars.

After this sale, in 1824, B. filed his petition against A. in St. Louis Circuit Court, to foreclose the equity of redemption to all the real estate included in the last mortgage, situate in St. Louis county; upon which judgment was rendered, that unless A. pay the mortgage debt on or before the 3d November, 1825, &c., that the mortgage premises be sold, &c. No steps were ever taken to carry into effect this judgment. The heirs of A. filed their bill to redeem the real estate included in the above mortgages, &c. *Held:*

1. That an equity of redemption could be sold on an execution at law, previous to the revision of the Statute Laws in 1825, as well as subsequent to that revision.—See 1 Territorial Laws, 1807, ch. 38, sec. 42, 43, p. 120.
2. That where a mortgagee institutes suit at law to recover the debt secured by the mortgage, and obtains judgment for the amount of the debt, he will not be allowed to sell the equity of redemption, under execution on such judgment. Therefore, the sale of the mortgaged property by B., under the judgment obtained on the bond for 5,500 dollars, in 1824, was void, and the heirs of A. had a right to redeem the real estate in the first mortgage.
3. That the proceedings on the petition of B. for the foreclosure of the real estate included in the last mortgage, amounted to an admission by B. that A. had a right to redeem the lands included in that mortgage.

APPEAL from St. Louis Court of Common Pleas.

LAWLESS and NABB, for Appellants.

1. An equity of redemption, on the 6th October, 1824, was the only interest to which McNair and Wife were entitled, and which, at that time, could not be the subject of levy and of sale, on a *fi. fa.* at law.

2. If an equity of redemption at that time was saleable on *fi. fa.* at law, it could not legally apply to this case; because the *fi. fa.* was on a judgment at law, obtained on the mortgaged debt.

3. If saleable on *fi. fa.*, John Mullanphy, mortgagee, could not become a purchaser at the sale.

4. The conduct of Mullanphy, at the sale, was oppressive and fraudulent, and thereby, by denying a competition of bidders, and otherwise, depreciated the value of McNair's interest and property.

I. An equity of redemption was the only interest to which McNair and Wife

were entitled on the 6th October, 1824, which interest neither then was, nor could be, sold, under the statutory provisions of Missouri, nor at common law, or *fi. fa.*, or general judgment.

1st. As to the interest of McNair and Wife, on 6th October, 1824,—*Vide* record, the several mortgages at pages 46, 51, 76; *vide* return of sheriff, p. 70; *vide* p. 76, as to the judgment; *vide* return of sheriff on judgment, 5500, p. 77, 78; *vide* p. 79, as to the proceedings at law.

2d. At common law, an equity of redemption not saleable.—*Vide* 1 Pow., 258, note R.; 1 Mad. Ch., 522; 4 Kent, 160; 1 Pick., 399.

3d. An equity of redemption is an estate derived from every contract of mortgage, and possesses the inseparable incident of foreclosure, which must be had through a *judicial decree*.—4 Kent, 135; 1 Pow., 116; 2 Johns. C. Rep., 100.

4th. And before foreclosure, no act of mortgage can effect, in any way, the right of redemption in mortgage.—*Vide* *Wilson vs. Twup.*, 7 Johns. C. Rep., 37, 38; 9 Cow., 358, 360, 361, 371, 389, 390, 391.

5th. An equity of redemption, being a *mere creature* of equity, is an estate and interest *sui generis*, and *can only* be construed, understood and enforced by a power residing in a court exercising chancery power.—*Vide* Fonb., 227; 4 Kent, 163; 1 Mad. Ch., 451; 3 Bin., 8.

6th. An equity of redemption being thus a creature of equity, partakes of, and is, in fact, a *trust estate*; if not *express*, certainly a constructive trust, which could only be sold under statutory provisions, where the common law is recognized.—

1. In England, a trust estate not saleable before 29 Charles II.; 8 East, 482; 24 Law Lib., 298; 1 Vesey; *Case of Lysler vs. Dolland*, 1 Pow. on Mort., p. 255, note K.

If trust estate be not saleable at common law, and in England, only by statute of 29 Charles II., an equity of redemption being, as aforesaid, peculiar trust estate, was not embraced in the provisions of 29 Charles II., because the words, "lands, tenements, and hereditaments," &c., did not contemplate "an equity of redemption," for the words "equitable interest" were not embraced; showing by the absence of the word "equity," nothing can be inferred in a statutory provision.—8 Peters, 691; Sanders, H. and T., p. 191; also, note X, for the words, 2 statute of Chas. II.; 1 Power, 257, note; 1 Ves., 431; 7 Pick., 51; 13 Peters, 294; 5 Harris and Johnson, 315.

An equity of redemption could not have been contemplated by the Legislature of the Territorial Government.—Geyer's Dig., title, "Judicial Proceeding," sec. 63, 66; *Ibid.*, p. 307, title, "Mortgages," being an express provision for the sale of mortgaged estates.

This statute must be strictly pursued by the party, mortgagee, and while there existed no chancery power, a common law court was entered to be the forum for the remedy, which cannot change or affect the principle in equity, to wit, that "once a mortgage, always a mortgage;" and being such, there arises an incident of foreclosure, which must be disposed of before the right of mortgagor can be released or annihilated, either by special contract or judicial sentence; consequently, the power was given to the common law courts through which to obtain

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relief, clearly showing, that though a remedy is in a court of common law, yet it may become the vehicle of effecting it.—1 Dallas, 211; Laussett's Equity, 41, 44; 13 Peters' Rep., 294; 13 Johns. Rep., 551, 102; 11 Mass., 165; 9 Cowen, 182.

It is admitted by the court below, that this was an Anglo-American mortgage. If so, the interest is purely equitable, and is contradistinguished from legal interest; and being so, could not be affected by affording a remedy in a court of common law.

This view arises from several acts of Congress, relating to judiciary powers in territory of Louisiana, and then the territory of Missouri.—2 Story, 938, sec. 13, 975, sec. 1, ch. 99; 3 Story, 1255, passed 4th June, 1812; *Ibid.*, 160-163, passed 29th April, 1816. Also, in Geyer's Digest, several titles of mortgage, and other titles showing a distinction between law and equity: also, the introduction of equity of power in 1811, p. 124, title, "Common Law."

Thus, the whole system of legislation in Congress and the Territory shows, from the commencement to act of 1839, that there is a negation to sale of equitable right.—See, also, the reasoning of the court by Lord Ellenborough, in *Scott vs. Scholey*, 8 East, which shows the injustice of other doctrines: also, note K, in *Pow.*, 255.

It was objected in argument below, that no other creditor than mortgagee could enforce payment of his debts. To the fallacy of such reasoning, I refer the court to 1 Geyer's Digest, title, "Mortgage"; 1 *Pow.*, note B, 261; 13 *Law Lib.*, 108.

As to the policy of protecting the rights of mortgagors or mortgagees, *vide Sugd.*, p. 128; 1 *Johns. C. Rep.*, 30.

Compare the statutes with the provisions of equity Charles II., (Saund. H. and T., note X; Geyer's Digest, title, "Jud. Pr.," sec. 63, 66,) and decisions in other States whose statutes contain like provisions, *vide Hardin's Rep.*, p. 19; 1 *Saxton*, 304.

If an equity of redemption be real estate, a judgment would be a lien on it, and an innocent purchaser might be affected.—1 *Johns. C. Rep.*, 55; *Hart vs. Reeves*, 5 *Hayw.*, 58, (which I cannot find but by reference.)

If an equity of redemption be saleable, it must be levied on as such.—*Con. Dig.*, 105, 518; 1 *Pow.*, note, p. 255; 7 *Pick.*, 51; 4 *Pick.*, 160; 8 *East*, *Scott vs. Scholey*.

If saleable at law, an equity of redemption could not be sold on a judgment on mortgage-debt.—*Perry vs. Barker*, 8 *Ves.*, 527; 10 *Johns.*, 482; 1 *Pick.*, 352, 3, &c., *Atkins vs. Sawyer*; 4 *Pick.*, 133, 4, &c., *Crane vs. Marship*; 4 *Pick.*, 253, *Curling vs. Hardin*; *Schottenkerk vs. Whale*, 3 *H. Rep.*, 279.

As to the election of mortgagee to sue on bond, he thereby waives his right against the mortgaged property.—3 *Johns. C. Rep.*, 330, *Dunkley vs. Van Beuren*.

The mortgagee cannot become the purchaser on debt mortgaged, at judgment at law, at his own sale. If so, the mortgagee may still redeem.—4 *Hen. and Munf.*, 101, *Dabney vs. Green*; *Tea vs. Annan*, 2 *Johns. C. Rep.*, 127; 1 *Pick.*, 354; *Pow.*, 1001.

The mortgagee is regarded *quasi* trustee, at least, to mortgagor, after forfeiture. 1 *Mad. Ch.*, 512; 1 *Pow.*, 330, and part of note M to p. 330; 1 *Pet. S. C. Rep.*,

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441; *Conrad vs. Atlantic Co.*, 1 Mo. Rep., case of Carr and Holbrook; 2 Merivale, 259, 260; 13 Johns. Rep., 555-558; Cowen, 378.

As to the hostile attitude mortgagee bears to mortgagor, that does not evade the principle, any other than that of *Creditor vs. Debtor*; but as every creditor on simple contract has his remedy, which is as necessary to be pursued, as the creditor or specialty must pursue the action prescribed to him.

It is contended, that if Mullanphy purchase any interest, it was the equity of redemption of McNair, and not Mrs. McNair's whole equity of redemption arising on her contract as well as that of Alex. McNair; and it is not for the defendants to deny the ability of Mrs. McNair to make contract, or bond and mortgage, in both of which she joined.

If mortgagee could evade the remedy pointed out by the statute, it would nullify the act of 1807, and the mortgagee then become his own purchaser; and the consequences of oppression would be apparent.—2 Johns. C. Rep., 30.

If the doctrine of merge be called in, in aid of the bill of the mortgagee, on the hypothesis that he could purchase, the courts of equity apply it according to the intention of the mortgagee, purchaser, to be determined by his own acts. In this case we refer to the petition of foreclosure of mortgage, of 17th April, 1821, to show his admission of existence of mortgage, and thereby the equity of redemption in Mr. and Mrs. McNair.—*Vide* 10 Johns., 482; in case of *James vs. Morer*, 4 Wend., 24-26.

Fraud may be inferred from fiduciary relations, or the relation of mortgagor and mortgagee, when mortgagee departs from the prescribed boundaries given him by statute to recover his debt.—2 Sch. and Lefroy, 673; 1 Story Eq. Com., 198, sec. 188, 190; 18 Ves., 483; 2 Story, 200, 266; 2 Johns. C. Rep., 30; 5 Gill and Johns., 75; Pow., 124, note 2.

From fact of interference at sale—Sug., 127.

As to inadequacy of price—14 Ves., 240.

Evidence of Dent, Evans, and all the circumstances.

SPALDING, for Appellees.

The appellees make the following points:—

I. Equity of redemption passed by sheriff's sale, on the judgment on the bond.—Geyer's Dig., 266, 267, sec. 63, 64, 66; Edwards' Comm., 855, sec. 3; Acts of Assembly of 1821, '2, p. 93, sec. 61, as to liens of judgments on "real estate."

See 3 Miss. Rep., 492, and 4 Miss. Rep., 319, 380: That mortgage in Missouri is not the same thing as in England.

3 Martin's Rep., (old series,) 574; 4 *Ibid.*, 397; 5 *Ibid.*, 634: To show that, under Spanish laws, which formerly were the law here, an equity of redemption could be sold on execution; and the last case was a judgment in favor of the mortgagee, on the mortgage debt, and under those laws there was no distinction of estates into *equitable* and *legal*.

The custom was to sell equity of redemption here always. The words, "lands

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and tenements," &c., were used to comprehend all interest in lands.—See Territorial Laws *passim*.

1 Caine's Cases in Error, 46: That equity of redemption can be sold, on judgment and execution.

4 Johns. Rep., 41; 6 *Ibid.*, 290; 7 *Ibid.*, 278; 11 *Ibid.*, 538; 19 *Ibid.*, 325; 5 *Ibid.*, 454; 2 Cowen's Rep., 195: These New York cases show that the mortgagor is held to be the owner substantially; that the wife has dower in the equity of redemption, &c.

1 Johns. C. Rep.: Equity vendible on execution, on principles peculiar to mortgages.

1 Day's Rep., 93: That equity of redemption can be taken on execution in Connecticut.

9 Cranch, 456, 485, 6: That the same is true, as to attachment, in Maryland, under the words, "lands, tenements," &c.—See 5 Haw. and Johns., 551.

13 Peters' Rep., 294: That in many of the States the mortgagor is viewed as the owner, &c., in a court of law.

1 Shep. Touch., 91: Defining tenements and hereditaments; note 2 also.

Saunders on Uses, 186; Lewen on Trusts, 216: Equity of redemption is not a trust.

That mortgagee can sell on judgment on the mortgage debt, and buy, himself, see the following authorities:—2 Johns. Ch. Rep., 125, *Tice vs. Annan*; (in this case the chancellor holds the sale valid, and decrees accordingly; and intimates, as the proper remedy, that on application in time, he will enjoin such a proceeding;) 10 Johns. Rep., 481; 2 Halsted's Rep., 409; 3 Martin's Rep., 574.

The following were cited by appellants on this head:—4 Hen. and Mun., 101; 7 Dana, 65; 1 Pick. Rep., 351.

Neither the first nor the last of these cases were decided on the ground, that an equity of redemption cannot be sold on a judgment on a mortgage debt. A judge in each case intimates his opinion to that effect. The second turns on the local laws of Kentucky.

6 Miss. Rep., 273: A mortgagee can sell under a power.

II. The mortgagee has a right to buy at the sheriff's sale, and he is not trustee in any such sense as to prevent his bidding, particularly in this country.—3 Powell's Mortgages, 1154, *a*; 1 *Ibid.*, 122, 127, *a*.

III. An equity of redemption does not, of necessity, remain till foreclosure; but it may be extinguished by payment or release, or by sale of it to mortgagee.—1 Powell, 307; 3 Johns. Ch. Rep., 56; 6 *Ibid.*, 417; 5 *Ibid.*, 35, 214; 2 Cowen's Rep., 246.

These cases show that where the legal and equitable interests meet, there is a merger, as to so much of the property as is put in that situation.

IV. Mullanphy's conduct was not fraudulent, so as to invalidate the sale.

1st: His suing, when interest on his debts was in arrears several years, is no indication of fraudulent intent.

2d: Neither is his waiting several years after the mortgage property ceased to be good security for the debts, from its great depreciation,—which depreciation

commenced in 1820, and came to its height in the Fall of 1821, by the breaking of the Bank of Missouri.

3d: Nor could he have had any motive to cheat or oppress, as the mortgaged property in 1822, 1823, 1824, and 1825, was not of sufficient value, that if it sold at full prices at private sale, it would not have brought sufficient to pay half of the mortgage debt.—See testimony of J. K. Walker, William C. Carr, D. Hough, Charles Mullikin, Peter Lindell, Jesse Lindell, &c.

4th: The altercation with Rankin, proved by Evans and Dent, indicates no fraud. They had just before quarrelled, as Evans states, at a public sale, and it was renewed on the occasion of McNair's sales. Besides, he had a motive, not to pay high commissions.

5th: His conduct at the sale was not fraudulent. He gave a notice of the fact of his incumbrance.

6th: His remarks to Letcher, warning him not to build on the lot, indicated no fraud. If he wished to cheat, why did he not let Letcher build, and then hold his house on his mortgage?

7th: McNair lived some fifteen or eighteen months after this sale; if he was so much wronged, why did he not move to set it aside, or file his bill, while the facts were fresh, and witnesses alive and able to remember what took place?

8th: Seventeen years elapsed after that sale, before this suit was brought; and this laches in McNair and his wife and children, will render the court indisposed to rake up these matters.—3 Miss. Rep., 516; 8 Cow., 384; 10 Peters' Rep., 473; 4 Dana's Rep., 441.

V. Mullanphy's heirs are not estopped from denying an outstanding equity, by the record of foreclosure.

This record refers only to the last mortgage at any rate, and does not embrace the three most valuable pieces of land.

The object of this foreclosure was, probably, to get at the lot that Rankin bought; and to do this, it was necessary, under the act, to proceed against McNair alone.

VI. Margaret S. McNair, the widow, has no right to redeem.

1st: Her right was relinquished by executing and acknowledging the mortgages.

2d: The sheriff's deed divested her right.—Geyer's Dig., 161, sec. 1, and 164, sec. 5; Edwards' Compilation, 399, 509.

3d: And she has lain by, and is guilty of laches fifteen years after her husband's death, and eight years after Mullanphy's death.

Acknowledgment of mortgage sufficient.—4 Leigh's Rep., 498.

VII. Rankin's answer is not evidence against his co-defendants.—5 Johns. Rep., 412, 426.

VIII. The evidence which was excluded below, was rightly excluded. This evidence was of the sayings of McNair, and of course report.

These two last points cannot be taken advantage of under the assignment of errors, which is general.

IX. McNair was not wronged in any manner by the proceeding and purchase of Mullanphy, for the property was not worth half enough to pay the debts, and the

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bonds have never been pressed for the residue of the debts, and after this lapse of time cannot be; nor has any resort been had to the several pieces of property, included in the mortgages, which do not lie in St. Louis county.

The prices below affixed to the several pieces of property sold on execution are higher than would have been got for the same property, if sold at private sale, in 1824. And it is to be remarked, that the complainants' witnesses do not appear to be qualified to judge of prices at that time, while the defendants' witnesses are proved to be among the best judges, from actual dealings at the time, and familiarity with prices and sales.

Lands in First and Second Mortgages.

- 1.—2 by 40 arpents, bounded east by Mississippi, in Morin tract, some four miles north of St. Louis.
 - 2.—7 by 40 arpents, situated by side of foregoing in same Morin tract. Take both of these at five dollars an arpent.....\$1800
 - 3.—Lot bounded south by Spruce-street, east by Main-street, about 100 or 120 feet front, on which is white house in Cross-street, and old French house on the corner\$2000
- See testimony of Charles Mullikin, D. Hough, J. J. Purdy, W. C. Carr, H. S. Geyer, Jesse Lindell.

Lands in Third Mortgage.

- 4.—Lot 25 feet on Main-street, by 75 deep, adjoining the foregoing\$300
- Same witnesses.
- 5.—Lot by Joseph Papin and Valois, and by 40 arpent lots,—a barn lot, 60 feet front, without buildings. Letcher says, in 1820 or 1821 he offered to give \$2000 for it. How or what he was to pay, or when, does not appear, but in 1824 the following price must have been several times its value.....\$1500
 - 6.—Lot bounded east by Esther, and north by cross street.—No value is put, by any of the witnesses, on this lot. I think it is 60 feet wide. Five dollars a-foot would have been a large price, according to the general state of things\$400
- See Millikin's testimony as to Lawless' house, which is nearer this than any other that is valued.
- 7.—Lot sold to Rankin, 38 feet on a cross street, by 170 deep. This is on the same cross street with the lot mentioned above. The testimony that applies to that applies also to this\$300
 - 8.—640 acres on the Merrimack\$1280
- J. K. Walker.

As to the point that the marriage was under the Spanish laws, and that she has an interest in the community, and a right to redeem, I answer—

1. That the record does not show she was married before the American laws were passed, viz., before an act was passed giving dower, &c., and thus repealing the law of community.

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2. That even if she was married then, and the marriage law was as it is said by Lawless to be, yet the record shows that the lands were acquired since the first act, giving dower, was passed. (See Hempstead's Digest, 132, sec. 6, 7, 15, 16, &c.; Edwards' Compilation, 128.) So that there was no community; then, of course, her only right was what the act gave her, that is, dower.

3. Even were there a community, the property of it was, by Spanish law and American law, liable for the debts of the community. The lands have been sold for the debts of the community.

4. She has also conveyed away her right, by joining in the deed without any redemption reserved.

6. No such pretence as community has been set up in the bill, and there can be no relief on a case not presented in the bill.

GAMBLE, *for Appellees.*

On the cause, as argued in the court below, the complainants' counsel relied upon many positions of law, which are believed to be fully answered in the following points for appellees.

I. That McNair's interest in the property, being an equity of redemption, was subject to be sold on judgment and execution at law.

The act of July, 1807, (Geyer's Dig., 266, sec. 63,) authorizes the sale of lands, tenements, and hereditaments. The 66th section of same law declares the effect of the sale when made; it is to pass "all the estate and interest which the defendant had in the property at the date of the judgment, and which he might lawfully convey."

As the language of this law is very comprehensive, and would certainly embrace interests in real property of every description, many authorities have been cited to show, first, that, by the common law, an equity of redemption was not subject to execution; second, that in the construction of statutes in countries where the common law prevailed, the words, "lands, tenements, and hereditaments," do not embrace equities of redemption in lands.

To these authorities we reply—

1st: That our statute was passed when the Spanish law was in force, and when lands subject to mortgage were liable to be sold for the payment of debts; and therefore, in the construction of the 63d section, the words, "lands, tenements, and hereditaments," will be held to embrace equities of redemption.—4 Martin's Rep., 397; 3 Martin, 574.

2d: If the common law were the basis of our jurisprudence at the date of the act, still the 63d and 66th sections, taken together, show the purpose of the law-makers to be, to subject every interest in land to sale on execution, which the debtor could pass by his own conveyance. Whether, then, the Spanish or the common law be the system, the act subjects equities of redemption to sale on this process.

There was, when this act was passed, no distinction between legal and equitable estates, and no distinct jurisdiction over such different interests, and in such

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case, as in Pennsylvania, 3 Binney, 8, the judgment would bind, and the execution would sell an equity of redemption.

Again: at the time of the sale, all property embraced by the term "real estate," were bound by a judgment, and consequently liable to sale.—Acts of 1822, p. 93, sec. 61; and an equity of redemption is embraced in these words.—1 Caine's Cases, 47; 9 Cowen, 80.

II. In some of the United States the courts have held equities of redemption subject to sale on execution at law, by the construction of their legislative acts, while in others, a contrary construction has been given to similar acts; but in all cases, the acts seem to have had no stronger words than those in the 63d section of our law, and in no case approach, in strength, to words employed in the 66th section of that law.

As in New York—1 Caine's Cases, 47; 4 Johns. Rep., 41; 7 *Ibid.*, 278; 11 *Ibid.*, 538; 19 *Ibid.*, 325; 5 Johns. Ch. Rep., 452, *cum multis aliis*.

So in Maryland—9 Cranch, 456, 496; 5 Har. and Johns. 312.

So in Massachusetts—1 Pick., 355; 1 Powell in note, (a) 254.

So in Connecticut—1 Day, 193.

III. The equity of redemption may be sold, on judgment and execution, for the mortgage debt.—Tice vs. Annan, 2 Johns. Ch. Rep., 125.

The courts, in Tice vs. Annan, and in Atkins vs. Sawyer, 1 Pick., 355, state that there are difficulties in such sales; but it will be seen, on examination, that they are technical difficulties merely, and it will be seen, that these difficulties are to be met in different modes.—See 2 Blackford's Rep., 243, in which the court holds that the whole title passes upon such sale, free from the mortgage. Apply the doctrine of merger as the remedy, and many of the difficulties disappear.—2 Cow., 246.

IV. The mortgagee may be the purchaser at such sale.

The only objection made to his being the purchaser is, that he maintains a fiduciary relation to the mortgagor. Many authorities have been cited to prove that the mortgagee is a trustee, and others to prove that a trustee cannot purchase the trust property.

It will be seen, on examination of these authorities, that the mere expressions used by courts, that the mortgagee is a trustee, never were designed to declare the relation between mortgagor and mortgagee to be that which subsists between a trustee for sale and he *cestui qui trust*.

It is most clear that no such relation exists between the mortgagee and the mortgaged property, as exists between the trustee for sale and the trust property; which relation prohibits a purchase by the trustee.

V. The evidence taken to show misconduct of Mullanphy at the sale, shows no misrepresentation of facts, no artifices, nothing but declarations which were true; and there is nothing to show that any advantage was gained by him. On the contrary, the whole evidence shows that the whole property was not worth half the value of the incumbrances; and it is certain that no farther effort has been made to enforce the debts on McNair.

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VI. A claim is set up to redeem by Mrs. McNair, as widow entitled to dower.

It does not appear when the marriage between Mrs. McNair and the complainant took place.

At the time of this sale, a sale on execution divested dower. (Geyer's Digest, title, "Dower.") This is independent of the fact that she executed the mortgage.

If the sale was valid at all, it passed her dower.

Scott, Judge, delivered the opinion of the Court.

This was a bill in chancery, filed by Margaret S. McNair, the widow and administratrix of Alexander McNair and the heirs of the said McNair, against the defendants, the executors and heirs, and devisees of John Mullanphy, deceased.

It is alleged in the bill, that Alexander McNair, being indebted to John Mullanphy, on the 26th day of January, 1820, executed to him his bond for the sum of \$5,500, payable one year after date; and to secure the payment of the said sum, McNair and his wife executed to Mullanphy a mortgage in fee on the following described parcels of land and lot in the county and city of St. Louis, viz.: A lot of ground about six miles north of St. Louis, 2 arpens in front and forty in depth; also, a tract adjoining the last mentioned parcel on the north, seven arpens in front and forty in depth, both bounded on the east by the Mississippi river, and formerly owned by Antoine Morin; also, a lot in the city of St. Louis, on Main-street, 150 feet deep, bounded on the east by Main-street, and on the north by a lot formerly owned by Patrick Lee.

On the 30th November, 1820, McNair executed another bond to Mullanphy, in the penal sum of \$1,000, conditioned for the payment of \$500 one year after date. To secure the payment of this bond, the tracts of land above described were again mortgaged by a deed executed by McNair on the 16th December, 1820.

By a deed bearing date 17th April, 1821, McNair and wife mortgaged in fee to Mullanphy, for the purpose of securing the payment of another sum of \$3,951, with interest, many other lots in the city of St. Louis and town of St. Charles, and lands in the counties of St. Louis and Jefferson.

Mullanphy, on the 18th day of August, 1823, commenced an action of debt against McNair, on the bond for the sum of \$5,500, and recovered judgment against him on the 2d day of July, 1824. On this judgment, an execution was issued returnable to the October term, 1824, of the St. Louis Circuit Court, under which the sheriff seized all the property that was mortgaged, to secure the debt for which the judgment was rendered; and also all the property situate in St. Louis county and city, mortgaged on the 17th day of April, 1821, to secure the payment of the debt of \$3,951. At the sale, Mullanphy became the purchaser of all the property included in both mortgages, for the sum of \$2,700, except one lot, 38 feet wide and 120 feet deep, included and described in the last mortgage, which was purchased by Robert Rankin, for eighty dollars.

It is also alleged in the bill, that Mullanphy attended the sale in person, bid for each piece of property as it was offered, and, for the purpose of intimidating purchasers, and causing a ruinous sacrifice of it, in his own favor, proclaimed to

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the bystanders that he had heavy incumbrances on all the property, and exposed to their view papers which he said were mortgages.

In consequence of such conduct, many persons were deterred from purchasing the property, and the same, with the exception aforesaid, was knocked down to Mullanphy.

After this sale, on the 13th December, 1824, Mullanphy filed his petition in the St. Louis Circuit Court, against McNair and his wife, to foreclose their equity of redemption to all the lands and lots included in the third or last mortgage, situate in St. Louis county. On this, such proceedings were had that a judgment was entered in these words: "That, if the said Alexander McNair, and Margaret S., his wife, do not well and truly pay, and satisfy, to the said John Mullanphy, or his legal representatives, the sum of five thousand five hundred and sixty-four dollars, and twenty-two cents, the debt and interest in the petition mentioned, with legal interest on the sum of three thousand nine hundred and fifty-one dollars, together with his costs and charges, on or before the third day of November next, (1825,) then the sheriff of St. Louis county is required and commanded to sell, on the said third day of November next, the mortgaged premises in the petition mentioned."

No steps have since been taken to carry into effect this judgment. The first two mortgages were never foreclosed, otherwise than by the sale above mentioned, after which Mullanphy took and retained possession of all the property he purchased at the sale, until his death, which occurred on the 18th day of September, 1833, having made a will, and appointed John O'Fallon one of his executors. McNair died on the 18th day of March, 1826. The bill charges that the mortgage debts have been paid, or might have been paid, out of the rents and profits of the land and lots purchased by Mullanphy, and prays for an account and permission to redeem.

Upon filing the bill, the judge of the St. Louis Circuit Court being a party to the cause, it was sent to the Court of Common Pleas.

Robert Rankin, who was made a party, admitted, in his answer, that he was present at the sale on the 6th October, 1824, and became the purchaser of a lot, as charged, for which he received a deed from the sheriff. He did not know that McNair set up any claim to the lot; that he purchased it in good faith, and has paid the purchase money. The answer of Rankin being excepted to, for not responding to that part of the bill in which oppressive conduct is charged against Mullanphy at the sale, and for not stating the value of the property sold, and the exceptions being sustained, he further answered, that he was at the sale; that Mullanphy was present, and proclaimed to the bystanders that whoever purchased any part of the property offered, would purchase a law-suit; that he held a mortgage on the property for a large amount; that when he, Rankin, bid for the lot he purchased, Mullanphy warned him not to bid, that he was buying a law-suit. He cannot state the value of the property purchased by Mullanphy, but his opinion then was, and still is, that Mullanphy obtained it for much less than its real value, and for much less than it would have sold for, but for his interference and threats.

The answer of the executor and heirs of Mullanphy to the bill, admits the recovery of the judgment on the bond for \$5,500 on the 2d July, 1824; the award of the execution on the same on 20th August, returnable to the October Term, 1824; that, under said execution, on the 6th October, the sheriff sold all the property included in the two mortgages, except that in the counties of St. Charles and Jefferson, and that Mullanphy became the purchaser for \$2,700 of all the same, save that he sold to Rankin; that, on the 16th October, the sheriff executed a deed to Mullanphy for the property purchased by him; that neither Mullanphy, before his death, nor his representatives since, have attempted any further to enforce said judgment. They know nothing of the conduct of Mullanphy at the sale: that, as to the mortgages mentioned in the bill, they supposed they were executed as they appear. They did not know when Mullanphy entered into possession of the property, or any part of it, or what rents he received. That they were at some expense in defending suits against part of the property, in which B. Ames and others, claiming the same by title paramount to McNair's, prevailed. To this answer, a replication was filed, and on the hearing, evidence in relation to the conduct of Mullanphy at the sale, and as to the value of the property, was introduced. The exhibits were also read in evidence. The court entered a decree dismissing the bill, from which the complainants appealed to this Court.

Many points were made in the argument of this cause, to all of which we shall not advert, deeming it unnecessary, but will confine ourselves to the most important, and those in which the merits of the cause are involved.

The first question made was, whether an equity of redemption could, before the revised laws of 1825, be sold on an execution at law? This question has been twice argued very elaborately in this Court, and it must be confessed, is not without its embarrassments. It may be admitted that, in England, there cannot be a sale of an equity of redemption upon a mortgage for a term of years; but if we consult the decisions of the American courts, authorities entitled to great respect are to be found in support of either side of the question, and this contrariety of views must, in a great measure, be attributed to the different lights in which a mortgage is viewed in courts of law and equity. The severe features of the ancient common law in relation to mortgages have been relaxed, and the opinion that a mortgage is a mere security for a debt has been steadily gaining ground in courts of law. This is the equity view of the subject, and Chancellor Kent remarks, that courts of law have, by a gradual and almost insensible progress, adopted the equity views of this subject, which are founded in justice, and accord with the true intent and inherent nature of every such transaction; and he continues, that in this country the rule has very extensively prevailed, that an equity of redemption was vendible, as real property, on an execution at law. In the case of *The King vs. St. Michael's, Doug.*, Lord Mansfield declared, it would be an insult to common sense to say the mortgagor is not the real owner of the mortgaged property. Lord Hardwick, in the case of *Cashborn vs. Inglis*, 1 Atk., 603, said an equity of redemption had always been considered as an estate in the lands, for it might be devised, granted, or entailed with remainders, and such

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entails and remainders might be barred by fine and recovery, and therefore it could not be considered as a mere right only, but must be taken to be such an estate whereof there might be a seizin: that the person, therefore, entitled to the equity of redemption, was considered as the owner of the land. A husband may be tenant by the courtesy of an equity of redemption. To perfect this right four things are necessary,—marriage, issue, death of the wife, and seizin in fact. As to the latter requisite, it is laid down, that an equity of redemption was not to be considered as a mere right only, but must be taken to be such an estate whereof there might be a seizin. The chancellor, in the case of *Waters vs. Stewart*, 1 Caines' Cases in Error, 47, holds that a mortgage is merely a lien, until it is foreclosed, or the possession acquired by the mortgagee; that the mortgagor, until either of these events occur, is the beneficial owner; he takes the rents and profits without any account; he is a freeholder, qualified to vote as such; and he is deemed the owner of a landed estate, within the English settlement laws. Judge Spencer, in the same case, remarks, that where a statute speaks of a seizin, an equitable seizin may be as well intended as a legal one, and the term is applicable to both. He could perceive no substantial objection to the sale of an equity of redemption under an execution at law. Chancellor Kent says, in the same case, if the mortgagor is to be regarded, as respects his own acts, and the acts of the world, the owner, subject only to the lien of the mortgagee, it is neither unreasonable nor improper that courts of law should treat the land as his, under the same limitations. There is no more inconvenience in subjecting the land to execution because there is a mortgage upon it, than there is where a prior judgment has bound it. The vendee, in both cases, will purchase subject to the lien, and he can calculate the value, deducting the incumbrance, as correctly in the one case as the other. In the case of *Jackson vs. Parker*, 9 Cowen, it was held, that one in possession of land under contract of purchase, has a real estate in the land which is bound by a judgment in a court of record, and that his interest might be sold under an execution at law. (*Jackson vs. Scott*, 18 J. R., 94.) In the case from Cowen, it was said, that possession was an interest in lands, subject to the lien of a judgment, and might be sold under an execution. The interest of a party in possession is not a mere equity, like the interest of a mortgagor out of possession. The cases above cited were decided in New York, in which State *lands, tenements, and real estate*, are subject to sale under execution. Real estate includes every possible interest in land, except a mere chattel interest. The term *estate* is very comprehensive, and signifies the quantity of interest which a person has, from absolute ownership, down to naked possession. It is the possession of lands which renders them valuable, and the quantity of interest is determined by the duration and extent of the right of possession. A mere equity cannot be sold, but an equitable interest, coupled with the possession, may be sold on execution. The interest of a mortgagor or mortgagee in possession is bound by a judgment, and may be sold, but out of possession, neither has an interest upon which the lien of a judgment can attach.—*Jackson vs. Parker*, *Ibid*.

The statute in force here, under which the sale now the subject of consideration took place, is in these words:—"All lands, tenements, and hereditaments

whatsoever, within this territory, where no sufficient personal estate can be found, shall be liable to be seized and sold, upon judgment and execution obtained." This act was passed in the year 1807. The act of January 11, 1822, made judgments a lien on the *real estate* of the person against whom they were rendered. It seems, that in subjecting real estate to the lien of a judgment, it was designed that it should be sold on execution, for the lien of a judgment may always be enforced by execution. Then, if *real estate* could be sold under execution, our law was similar to that of New York, under which the case of *Waters vs. Stewart*, above cited, arose, in which it was held, that an equity of redemption might be sold by an execution at law.

It is a sound moral principle, that every species of property owned by a debtor should be subject to the payment of his just debts. At the date of the act above referred to, subjecting lands to sale under execution, nearly all the titles in the territory were equitable. The fee was in the Government, and had passed to but few. There was no court of equity as contradistinguished to a court of law. Courts of equity were not organized until the year 1811. (Geyer's Digest, 105.) As considerable estates might be mortgaged for small debts, it would follow, if the equity of redemption could not be sold under execution, the creditors would be deprived of one of the resources for payment of their debts. There is no doubt, that by the common law, equitable interests in lands might be subjected to the payment of debts by suitable proceedings in a court of equity. The strife was, whether they should be liable to execution at law. Then, there being no court of equity here, as contradistinguished from a court of law, all equitable interests in lands would be freed from the payment of debts; an exemption we cannot think contemplated by the legislative power. In Pennsylvania, where law and equity are blended in their system of jurisprudence, and equity, as contradistinguished from law, is unknown, at least in the administration of justice, it is a well-settled principle that a judgment is a lien upon every kind of equitable interest in land, and that such interests could be sold by execution at law. (*Carkhuff vs. Anderson*, 3 Bin., 8.) Such seems to have been the system of jurisprudence in this territory from 1804 to 1811; and if, during that time, equitable estates might be sold under execution, and the terms, "lands, tenements, and hereditaments," comprehended such interests, the mere creation of a court of equity afterwards would not restrain their signification to legal estates only.

Again: The 66th section of the act concerning judicial proceedings, (Geyer's Digest, 267,) in force at the time of the sale now under discussion, directed, that the sheriff, after a sale on execution, should give the buyer a deed, duly executed and acknowledged in court, for what is sold, which deed shall recite the execution, purchase, and consideration, and shall be effectual for passing to the purchaser all the *estate and interest* which the debtor *had*, or might lawfully *part with*, in the lands, at the time the judgment was obtained. If all the estate and interest which the debtor could part with passed by the sheriff's deed, then all his interest and estate were sold; for surely it was not the intention of the legislative power that the purchaser should have a deed for more than he

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purchased,—that he should take an interest for which he paid no consideration. The section which directs that lands, tenements, and hereditaments may be sold under execution, should be taken together with that prescribing the effect of the sheriff's deed, without regard to the order in which they stand, and their joint signification is, that all the estate and interest of a debtor, in lands, tenements, and hereditaments, which he may lawfully part with, shall be sold under execution. It may be said that the terms, *estate* and *interest*, mean legal, and not equitable, estates. We have before observed, that at the date of the act now under consideration, almost all the titles in this territory were equitable, in the common law sense of that term. But, independently of this consideration, on what principle are these terms to be held applicable only to legal estates? If a word, or term, by itself, includes several species or kinds, each of which can only be designated by a descriptive epithet, if that word, or term, is used without an epithet, showing that a particular species or kind was intended, then it is to be understood as comprehending all the varieties included in it. This is the natural construction of language. In the case of *Waters vs. Stewart*, before cited, we have seen that Judge Spencer held, that when a statute speaks of a seizin, an equitable seizin may as well be intended as a legal one. The term is applicable to both. To the same effect, Chancellor Kent, in the same case, remarks, "The word seizin, in a statute, is frequently construed to apply to an equitable, as well as a strict legal seizin." The application is always according to the subject-matter, and to give the statute complete effect. Now, what was there then in existence to limit the construction of the terms, *estates* and *interests*, to mere legal titles? These words were introduced in the year 1807, before the organization of a court of equity, and at the time of their introduction it was necessary to construe them as including equitable estates, in order to effect the intention of the law-makers, which was, to subject all lands, tenements, and hereditaments whatsoever, to sale on execution; and having this signification when first placed on the statute-book, neither the organization of a court of equity afterwards, nor the introduction of the common law, would restrain their import.

The next question we shall examine is, whether a mortgagee could institute a suit at law to recover the debt secured by the mortgage, take out execution, and sell the equity of redemption of the property mortgaged to secure the debt for which suit was brought?

In an examination of the books, cases are found in which such proceedings have been tolerated. I say "tolerated," for no case can be produced in which the question between the mortgagor and mortgagee arose, that has received the unhesitating sanction of a court. The confusion and embarrassment consequent upon such a step would disincline any court to give it its countenance. What is the sense of the thing, when the mortgagee, under execution, sells the equity of redemption of the property mortgaged to satisfy the debt? It is an admission that it is worth something over and above the mortgage debt. If not, why sell? What object can the mortgagee have, unless it is to unite the legal and equitable estates, and thereby defeat a redemption? If the mere equity of redemption is

sold, that is, the mortgagor's interest, after satisfaction of the mortgage debt, and the mortgagee becomes the purchaser, whatever sum he pays for the equity of redemption will belong to the mortgagor; for, as the mere equity is sold, he, by becoming purchaser, admits the mortgaged property is worth more than his debt, by the sum bid, and consequently, the debt is extinguished, and the sum bid will belong to the mortgagor. So, in fact, it is nothing but a new mode of foreclosure. But suppose a third person becomes the purchaser, (and it is a singular kind of auction where but one particular person can become a purchaser,) what is the consequence? Say, that he bids the amount of the mortgage debt; that amount is paid by the sheriff to the mortgagee; his debt is thereby satisfied, and the purchaser holds the property freed from the mortgage debt; and although he has bid the amount of the mortgage debt over and above it, yet the mortgagor receives nothing, and his equity is entirely sacrificed. To make this matter plain, let us suppose a case. A. has a debt of \$500, secured by mortgage on property worth \$1,000; he sues at law for his debt, takes out execution, and levies it on the equity of redemption of the mortgaged property: at the sale, B. becomes the purchaser for \$500; that is, B. is willing to pay \$500 for the property, after paying the mortgage debt; the sheriff takes B.'s \$500, hands it over to A.: A.'s debt is thus paid; the mortgage is extinguished, and B. takes the land, freed from the mortgage debt, and so, in fact, gets it for \$500, when he bid \$1,000; so the equity of redemption is sacrificed, and the mortgagor loses \$500. The same consequences ensue, though not to a like extent, when a purchaser bids less for the equity of redemption than the debt. The case of *Tice vs. Annan*, (2 J. C. Rep.,) would remedy this, by compelling the mortgagee to assign his debt and mortgage to the mortgagor, and thereby substitute him for the mortgagee, by which he can compel the purchaser to pay him the amount of the mortgage debt. But that very case shows there are circumstances under which this cannot be done, and so the mortgagor will be remediless. I do not consider the case of *Tice and Annan* as warranting such a mode of procedure. In the case of *Jackson vs. Hull*, (10 Johns. Rep.,) the question did not arise, for it was a controversy between the mortgagee and the purchaser of the equity of redemption. It was held, in the case of *Youse vs. McCreary*, (2 Blackford,) that by such a manner of proceeding, the mortgage was waived, and it was likened to a foreclosure; as the whole estate was deemed to have been sold. The case of *Lyster vs. Holland*, (1 Ves., jun.,) decided by Lord Thurlow, contains something in relation to this subject; and although that cause went off on another point, yet the propriety of such a proceeding was very much doubted by the chancellor. "Was there," says he, "ever an instance of such a proceeding as this? It was a new case to him, that this case obtains in mortgages."

But we will not rest our opinion on the opinion on the considerations above stated. The cases above cited all occurred where there were no statutory provisions on the subject of the foreclosure of mortgages, especially provisions of a character beneficial to the mortgagor, and which guarded and protected his equity of redemption against too speedy a foreclosure. Hence, in those States where

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such provisions obtain, it has been held that such sales are void. In Massachusetts, where the effect of such a course of procedure was, to reduce the length of time to which the mortgagor was entitled, to redeem, the sale was declared inoperative. In the case of *Atkins vs. Sawyer*, 1 Pick., where a mortgagee had caused a sale to be made of the equity of redemption on execution, for the purpose of paying the debt secured by the mortgage, the court said, if the sale of the equity be operative, its operation will be repugnant to the statute regulating the foreclosure of mortgages; it enables a mortgagee, at his will and pleasure, to reduce the mortgagor's right of redemption from three years to one, thus depriving him of an important advantage secured to him by the statute. In Kentucky, where similar statutory provisions prevail, the like doctrine obtains.—7 Dana, *Goring vs. Shrieve*.

The statute of 1807, concerning the foreclosure of mortgages in force when the sale took place, which is now the subject of consideration, conferred on the mortgagor rights of some importance, of which he was deprived by selling his equity of redemption, at the suit of the mortgagee, for the mortgage debt. That statute, in proceedings to foreclose, required twenty days' service of process before the return day, whereas, in ordinary proceedings at law, service fifteen days before the return term was sufficient. Moreover, the statute directed that the sale of the mortgaged premises should be at least nine months from the commencement of the process of foreclosure. The statute, in declaring that the sale should be postponed at least nine months from the commencement of the suit, did not intend that that should be the precise period at which the sale should take place, but from the manner in which it is worded, it is clear that the court had a discretion, and might, and, no doubt, would, upon showing sufficient cause, extend the time. All that was required was, that the sale should not take place in less than nine months; if that time was prolonged by the court, there was nothing in the statute to prevent it. In proceedings to foreclose mortgages in England, nothing was more usual than to extend, from time to time, the right to redeem. In the ordinary course of proceedings, lands might be sold in less than nine months, and this actually occurred in this cause. The method of procedure adopted by the mortgagee deprived the mortgagor of advantages secured to him by law; we are therefore of the opinion the sale was void.

The determination of this point establishes the right to redeem the land included in the first mortgage. It remains to be ascertained whether the complainants have a right to redeem that included in the third. It seems strange that we should be called upon to decide this question, when there is a solemn admission by Mullanphy that this right exists.

There is a decree of foreclosure in evidence, that unless A. McNair pay to John Mullanphy the sum of \$5,564 22, on or before the 3d day of November, 1825, that the mortgaged premises be sold. Mullanphy, before his death, nor the defendants since, have carried this decree into effect; it is unreversed, and is still binding; and is a solemn admission of McNair's right of redemption. That judgment or decree is an estoppel, and the defendants are precluded from deny-

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ing its justice and validity. In the case of *Offutt vs. John*, decided at this term of the court, after a review of all the authorities, it was held, that to make a judgment a bar, in cases where an attempt is made to litigate a second time a matter in which a court of competent jurisdiction had pronounced its sentence, it was not requisite to plead the former judgment in order to make it an estoppel, but it is sufficient if it was given in evidence, and that its force and conclusiveness were the same when given in evidence as when pleaded. And we are gratified to state, that the conclusion to which the court came in that case meets with the concurrence of Professor Greenleaf, a jurist whose learning and abilities have everywhere commanded the respect and admiration of the profession. (Greenleaf's Evidence, 567.) But had it been determined otherwise, the rule requiring a judgment to be pleaded, in order to constitute an estoppel, was never extended to cases in which the party relying on the judgment was precluded, by the form of proceeding, from pleading it. If he is denied that opportunity by the mode of procedure, he may show it in evidence, and it will in general have the same effect as pleaded.—*Howard vs. Mitchell*, 14 Mass. Rep.; Starkie, vol. 1.

The determination of the two last points settles this controversy, so far as the representatives of Mullanphy are concerned. To what extent, and in what manner, O'Fallon and Rankin may be affected, we give no opinion, nor, in alluding to them, do we mean to intimate that they will be effected by the decree which will be pronounced in this cause. We have mentioned them merely, that it might not be supposed they were overlooked. Nothing having been said in the argument in relation to the liability of the property held by them to redemption, we have deemed it most advisable to suffer that question to be determined in the court to which the cause will be remanded.

Decree reversed, and cause remanded.

TOMPKINS, J., *dissenting.*

PEERY vs. COOPER.

1. A. built a boat for B., for which the latter was to pay a stipulated price, *so soon as there was sufficient water in the Grand River to let the boat out.* Held: That A. could not recover the price until the happening of this contingency, although B. had, in the mean time, sold the boat.
2. When contingencies are so remote and uncertain that they may never happen, or where, indeed, it is reduced to a certainty that they never can happen, the party may, in certain cases, be relieved in a court of equity, and even courts of law have sometimes disregarded the condition in such cases; but not where the happening of the contingency, as in this case, is morally certain.

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APPEAL from Grundy Circuit Court.

DUNN, for Appellant.

1. The court erred in refusing to give the instructions asked for by the appellant.
2. The court erred in giving the instructions asked for by the appellee.
3. The court erred in overruling the appellant's motion to set aside the verdict, and grant a new trial.
4. The court erred in overruling the appellant's motion to arrest the judgment.

CLARK, for Appellee.

1. The true rule in the construction of contracts is, to enforce the mutual understanding of the parties, and sometimes the law will control even the literal terms of the contract, if they manifestly contravene the obvious purpose and understanding of the parties, and many cases are given in the books in which the plain intent has prevailed over the strict letter of the contract.—2 Kent's Com., 554, 555; 2 Adk., 32; 3 Randolph's Rep., 486.
2. The evidence in this case shows that the parties to this contract understood, at the time they contracted, that the boat was to be paid for the spring after it was built, or in a reasonable time, and not that the payment was to depend upon the rise in Grand River, which might never take place.—3 Randolph, 486.
3. The usual rise in the river not taking place, the money for the boat became due, and was payable to the plaintiff in a reasonable time.
4. In this case the plaintiff was entitled to pay for the boat at any time after the defendant sold it. By selling the boat before the rise took place in the river, and then receiving the same from the builder, he waived any right to further delay of payment, for, by the act of selling the boat, he appropriated it to his use.

NAPTON, Judge, delivered the opinion of the Court.

This was an action of assumpsit, brought by the plaintiff against the defendant, who is appellant here, to recover the purchase money of a flat-boat, built by plaintiff, for defendant, in the winter of 1842. The declaration contained a special count, setting forth a special contract, and two general counts, for work, labor, and goods, sold and delivered. The issue was non-assumpsit, and the trial resulted in favor of the plaintiff, whose damages were assessed at one hundred and sixty-one dollars.

It was proved upon the trial, that the plaintiff engaged to build for the defendant a flat-boat, fifty-three feet long and sixteen wide, for which he was to be paid three dollars per foot, and to be allowed something *extra* for caulking the gunwales, putting in pumps, and building a canoe. It was also agreed between the parties, that the plaintiff was to be paid so soon as there was sufficient water in the Grand

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River to let the boat out, allowing, after that contingency happened, time enough for the defendant to go to St. Louis with his boat load, sell his produce, and return.

It was also proved that the boat was built according to contract; that the extra work on it was worth between five and six dollars; that the defendant accepted the boat as a good and substantial one, and sold it to another on the same terms he himself had purchased it; and, further, that since the boat was built, and up to the time the suit was commenced, the Grand River had not been in a condition to allow the boat to go out; that it usually rose in the spring, but during this season did not rise until later than usual, and not until after this suit was instituted.

Upon this state of facts, instructions were asked of the court by each party, but the court refused to give the instructions asked for by the defendant, and in substance instructed the jury, that, if they believed the plaintiff had complied with his contract, and built the boat accordingly, and it had been accepted by defendant, and disposed of by him, they would find for the plaintiff, whether the Grand River had ever been in a navigable condition or not since the boat was finished, and before the suit was commenced.

Under these instructions, the jury found a verdict for the plaintiff, and the defendant made an unsuccessful motion for a new trial, and preserved, in proper form, his exceptions to the several opinions of the court.

We are of opinion, that on the state of the facts detailed in this bill of exceptions, the plaintiff was not entitled to recover. We agree with the counsel for the plaintiff, that contracts must be construed according to the plain intent and meaning of the parties, and where that intent is manifest, a literal interpretation will be avoided, to give effect to that intent. But the parties to this contract appear to have well understood each other, and have placed their meaning and understanding in very appropriate terms.

This is not like the case where A. agrees to pay B. one hundred dollars *near harvest*. There, A. is bound to pay when harvest time arrives, though a tempest, or some other unforeseen act of Providence may have destroyed the crops, and no harvest, in fact, is reaped during the year. The Grand River may usually rise in the spring, but the day, or week, or month, cannot be certainly known; it may not rise at all in a particular season; yet these are contingencies of which the defendant assumed the risk, and he must wait until the contingency happens on which his pay, by contract, depends.

When contingencies are so remote and uncertain that they may never happen, or where, indeed, it is reduced to a certainty that they never can happen, courts of equity, in certain cases, have relieved a party, and considered the contract as unconditional. So, even courts of law, in case of contracts upon contingencies which can never happen, will sometimes disregard the condition. But this contract does not belong to any of these classes. It is morally certain, that without a subversion of the laws of nature, the Grand River will rise and fall at intervals. A contract contingent on its rise is, therefore, not an uncertain or very remote contingency, and such a contract would be enforced both at law and equity.

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It is of no consequence whatever, that the defendant had sold the boat. This he had a right to do, on such terms as suited him, though it appears that he actually sold to the purchaser on the same conditions on which he had bought from the plaintiff. It did not concern the plaintiff whether the defendant sold the boat or not; both the defendant and his vendee had a right to expect, that, by their contract, the boat was not to be paid for until the Grand River was in a navigable condition. If the river had been in such condition, and the defendant had failed to make his contemplated trip to St. Louis, this neglect of his to avail himself of the rise would clearly not excuse him.

His responsibility, under his contract, would have arisen when the contingency on which it was made happened, and a reasonable time thereafter had elapsed to allow the defendant to have made his trading expedition, but it would be his own fault if, after the rise in the river, his adventure was abandoned.

Judgment reversed.

PERRYMAN ET AL. vs. THE STATE, TO USE OF RELFE, ADMINISTRATOR, &c.

1. A justice of the peace, in certifying transcripts from his docket, may embrace several judgments in one certificate, and it will not be necessary to certify each judgment separately.
2. A judgment which is voidable only, cannot be questioned in a collateral proceeding. It will stand good until reversed on appeal or writ of error.
3. The return of a constable on a writ is only *prima facie* evidence of the truth of the facts therein contained.

ERROR to Washington Circuit Court.

NAPTON, J., delivered the opinion of the Court.

This was a suit instituted in the name of the State, to the use of James H. Reece, administrator of M. T. Hunter, deceased, against the plaintiffs in error, upon the official bond given by Perryman and his securities, for the faithful discharge of his duties in the office of constable of Bellview township. The breaches assigned in the declaration were, first, that Mary Hunter, then administratrix of the estate of the said Matthew T. Hunter, on the 7th March, 1840, recovered a judgment against one McGuire for one hundred and fifty-five dollars and seventy-five cents, and on the 30th April, 1840, sued out execution, which was delivered to the constable, and said constable failed to levy according to the command of said writ; secondly, and thirdly, that two other judgments were

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obtained before the same justice, and executions duly issued to the said constable, and he failed to levy on the property of defendant in the execution.

The defendants pleaded *nil debit*, and performance generally. The court, sitting as a jury, found the issues for the plaintiff, and assessed his damages at one hundred and ninety-two dollars. A motion for a new trial was made, and overruled, and the whole testimony was preserved by bill of exceptions.

The plaintiff offered in evidence the docket of D. Hanger, a justice of the peace, from which it appeared that three several judgments had been obtained by Mary Hunter, administratrix, as aforesaid, against one John P. McGuire, upon which judgments executions were issued, and returned, "Property levied on, but found not to be the property of the defendant, on the 23d May, 1840.

"D. E. PERRYMAN."

The executions themselves were not given in evidence; and it also appears, that each of the judgments were by default, and the service of the summons in each case was "by acknowledgment."

It was also proved, that about the first of May, 1840, McGuire, the defendant in the executions, was in the possession of two horses, worth one hundred dollars each, and the wood-work of a wagon worth thirty dollars, which horses and wood-work witness believed to be McGuire's. It was also proved, that whilst the executions were in the hands of Perryman, and had been levied on the property found not to belong to McGuire, he was directed by James H. Relfe to levy the same on the horses aforesaid, and that there was sufficient time, when such directions were given, for the constable to have levied on and sold the same before the return day of the execution.

To reverse this judgment, it is contended, on behalf of the plaintiff in error—

First, that the transcript of the justice's docket is not properly certified;

Second, that the judgments, being by default, and no sufficient service of process, were void;

Third, that the executions were not produced on the trial; and,

Lastly, that the return was sufficient, and the constable was not bound to levy on other property, after a levy had been made on sufficient property to satisfy the executions, and that property had been found not to be liable to the writ.

The only objection to the certificate of the justice is, that one certificate is made to embrace the three judgments, instead of a separate certificate to each judgment.

There appears to be nothing in this objection. No reason has been given why the justice may not certify to the contents of three pages of his docket, as well as one.

With regard to the second objection, a distinction must be observed between judgments which are erroneous, and therefore voidable, and judgments which are absolutely void. If the defendant had no notice of the proceedings against him before the justice of the peace, the judgments were clearly void. But if notice was actually given, and the return of the constable established that fact, though the return might not be in conformity to the statute, the principle would not apply.

The party might have set aside the return in the justice's court, or, upon appeal, have reversed the judgment, but the judgment cannot be questioned in a

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collateral proceeding. It is merely voidable, and must stand, until reversed by writ of error.

The third objection might have availed the plaintiff in error, had it been made in the Circuit Court. It appears, however, from the bill of exceptions, that no objection was made to the reception of any testimony on the trial. It has been repeatedly held by this Court, that objections of this character come too late, when made for the first time in this Court. Had the objection been made at the trial, the executions might have been produced.

In relation to the return of the constable, it is immaterial whether it was *prima facie* sufficient or not. Allowing it to be a legal return, it was at best only *prima facie* evidence of the truth of the facts therein contained. In this case the plaintiff did not rely on the insufficiency of the return, but proved that the defendant in the execution was in the possession of other property than that levied on, and that such property was pointed out to the constable, with directions for him to levy on the same. This evidence was amply sufficient to establish the liability of the constable.—*Bell vs. The Commonwealth*, 1 J. J. Marshall, 551.

Judgment affirmed.

THE STATE vs. BROWN.

SAME vs. SCHLICK.

SAME vs. HANS.

1. If the offence in an indictment under the act of February 16, 1841, entitled, "An act to regulate groceries and dram-shops," be described in the words of the statute, the indictment will be bad.—See, *contra*, *The State vs. Comfort*, 5 Mo. Rep., 357; *The State vs. Martin*, *Ibid.*, 361; *The State vs. Mitchell*, 6 Mo. Rep., 147.
2. The act of March 18th, 1835, entitled, "An act to regulate inns and taverns," is, with the exception of the 33d section, in force, and an indictment for dealing in wines and spirituous liquors should charge that the defendant had no license for that purpose. If the indictment charges, in the words of the statute, that the defendant sold such wines, &c., "without having a dram-shop license continuing in force," the indictment will be bad.

ERROR to St. Louis Criminal Court.

S. M. BAY, Attorney-General, for The State.

POINTS AND AUTHORITIES.

1. The indictments charge the offences in the words of the statute, and are therefore good.—*The State vs. Comfort*, 5 Mo. Rep., 357; *The State vs. Martin*, *Ibid.*, 361; *The State vs. Mitchell*, 6 Mo. Rep., 147, wherein it is said, "It has often been decided, that if the offence in the indictment charged be described in the words of the statute, it is sufficient."

The State vs. Brown; Same vs. Schlick; Same vs. Hans.

2. In indictments founded on statutory offences, it is a general rule that all the circumstances which constitute the definition of the offence must be stated, but it is not necessary to state in the indictment that the defendant does not come within an exception in the statute, or to negative the provisos contained therein.—1 Chit. Crim. Laws, 281, 283.

3. The 33d section of the act of March 18, 1835, regulating inns and taverns, was repealed by the 50th section of the act of February 13, 1839, relating to groceries and dram-shops; and all the provisions of the first-named act, relating to the dealing in wines and spirituous liquors, were virtually repealed by the act of February 16, 1841, to regulate groceries and dram-shops; for the provisions of this act are inconsistent with those sections of the first-named act which relate to the dealing in wines and spirituous liquors. The act of February 16, 1841, expressly declares, that "no person shall, directly or indirectly, sell, &c., without having a dram-shop license continuing in force."

PRIMM and TAYLOR, for Defendants.

The Criminal Court did not err in arresting the judgment.

1. Because the indictments charge the defendants in error with selling *without a dram-shop license*, when the same should have charged the act or selling to have been done *without license generally*; for the defendants in error might well have sold under a *tavern license*, and yet had no *dram-shop license*.

2. The indictment must exclude the idea of authority to do a *malum prohibitum*.

NAPTON, J., delivered the opinion of the Court.

These three cases are alike in every particular. The defendants were indicted under the act of February 16, 1841, entitled, "An act to regulate groceries and dram-shops." The indictment charged that defendant, on, &c., at, &c., "unlawfully did sell spirituous liquors at his stand in the county of St. Louis, in less quantity than one quart, to be drank at the place of sale, without then and there having a dram-shop license continuing in force, contrary," &c. The defendants were severally convicted and fined twenty dollars each, but, upon motion, judgment was arrested.

If the act of March 18, 1835, to regulate inns and taverns, was in force at the finding of this indictment, it is clear, that the indictment was fatally defective, and the judgment was properly arrested. For although it is in general true, that to lay an offence in the express words of a statute is sufficient, yet, if the act of 1835 authorised tavern-keepers to vend liquors in quantities less than one quart, to be drank at the tavern stand, and the act concerning dram-shops gave the same privilege to dram-shop keepers, it would be necessary, in an indictment for the offence of selling liquors in small quantities, to negative the existence both of an inn-keeper's license and a dram-shop license. Either license would justify the selling, and if the charge be as it was in this indictment, that the selling took place without

The State vs. Brown; Same vs. Schlick; Same vs. Hans.

one or the other license, a conviction and judgment under such an indictment would be no bar to a subsequent indictment for the same offence.

The offender, after having paid the penalties of the law, for selling liquor in small quantities without a dram-shop license, might be again indicted and convicted and punished for committing the same offence under the act of 1835, concerning inns and taverns.

The indictment should charge the absence of a license *generally*, or the want of both a dram-shop and a tavern license.

But the attorney-general contends, that the act concerning groceries and dram-shops, approved February 16, 1841, virtually repealed at least so many of the provisions of the act of 1835, concerning inns and taverns, as authorised the vending of liquors in small quantities. Such would appear to be the case, if the 19th section of the act of 1841 received a literal construction, and was disconnected with other provisions in the same act. That section declares, that "no person shall, directly or indirectly, sell any wine or spirituous liquors, or any composition of which wine or spirituous liquor is a part, in any less quantity than one quart, nor in any quantity, to be drank at the place of sale, without having a dram-shop license continuing in force." But the very next section provides, that "no keeper of a *dram-shop or tavern* shall sell *on credit* any wine or spirituous liquors, or any composition of which wine or spirituous liquor is a part, in any less quantity than one quart," &c. This last section must be unmeaning, so far as it includes tavern-keepers, unless the act contemplated that this class of persons, as well as dram-shop keepers, was authorized to vend liquors in small quantities. A prohibition from selling on credit, of necessity implies a right to sell on some terms.

The 25th section of the same act provides, that the proper authorities of towns and cities may lay taxes on licenses to grocers, tavern-keepers, and dram-shop keepers. In no part of the act of 1841, concerning groceries and dram-shops, is the law of 1835, concerning inn-keepers and tavern-keepers, expressly repealed; on the contrary, as we have seen, several of its provisions have a reference to the provisions of that act, and seem to be founded on the assumption that it is still in force. The 19th section must therefore be construed with reference to the whole act, and to the act of 1835 on the same subject, so that all the provisions of each act, not absolutely inconsistent with each other, may stand.

All the acts relating to groceries and dram-shops passed previously to the act of 1841, were repealed by that law, and the 33d section of the act of 1835, concerning inns and taverns, was repealed by the act of 1839, concerning groceries and dram shops—and thus the law stood in 1842, when this indictment was found. The act concerning inns and taverns being still in force, with the exception of the 33d section, the indictment should have charged the want of a license generally; and the judgment of the Criminal Court, in arresting the judgments in these cases, is affirmed.

Garvey vs. Dobyns.

GARVEY vs. DOBYNS.

1. The action of debt, for rent in arrear, though founded on a deed, is an exception to the general rule, that wherever an action is founded on a deed, the deed must be declared on.
2. A lessor cannot recover for one month's rent in arrear, accruing under a lease by which the lessee was only bound to pay at the end of every three months.

APPEAL from St. Louis Court of Common Pleas.

TOWNSEND, for Appellant.

The appellant insists that the finding of the court was not justified by the evidence, and consequently that the court erred in overruling his motion for a new trial. He makes the following points:—

1st: The action was *assumpsit*, which is not supported by proof of a contract under seal.

2d: The instrument under seal was either in force, or not in force. If the endorsement upon the back of it, not being under seal, was insufficient as a cancellation of the instrument, then it was in force at the time of the bringing of the suit, and the plaintiff, by the terms of the instrument, had, *at that time*, no cause of action.

3d: But if the endorsement operated as a cancellation of the instrument, by the very terms of that cancellation the defendant is exonerated from further liability or responsibility on account thereof, *from and after that date*, at which date nothing was due.

4th: That both parties, the one in cancelling, and the other in consenting to the cancellation, of said instrument, must be presumed to *know the law*, and to have contemplated the legal effect of their acts.

5th: That the legal effect of their acts was, (if the said endorsement operated at all,) to annul and destroy the only contract which had ever existed upon the subject matter, and the only one upon which the plaintiff could in any case recover; the law never *implying* a contract where the parties have made one for themselves, by the terms and conditions of which they have mutually agreed to be bound. Were the law otherwise, a party, at any time dissatisfied with his contract, might waive it, and subject the defendant to liability in a way that he had never contemplated or consented to.—See 1 Chitty's Plead., 91, 92; *Grimman vs. Legge*, Barn. and Cross, 324; *Young vs. Preston*, 4 Cranch., 239; *Cook vs. Jennings*, 7 Term Rep., 377; *Clendennen vs. Paulsel*, 3 Mo. Rep., 230; *Crump vs. Mead*, 3 *Ibid.*, 233; *Helm vs. Wilson*, 4 *Ibid.*, 41.

6th: That no liability can be *inferred* from the defendant's consent to be *released* from liability, as his *non-liability* may reasonably be supposed to have constituted the *consideration* for such consent.

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7th: That, even could an implied liability spring up out of the circumstance of the defendant's *consenting* to the cancellation of the sealed instrument, it could arise only upon the supposition of the defendant's having had the *use and occupation* of the premises during the said month, of which use and occupation, however, there was *no* evidence before the court.

8th: That, whatever may have been the intentions of the parties, or either of them, the *mistakes* of the parties cannot be remedied in courts of law.

NAPTON, J., delivered the opinion of the Court.

Dobyms filed in the office of a justice of the peace for St. Louis county, an account against the appellant, in the following terms:—

“St. Louis, April 8, 1842.

“CHRISTOPHER GARVEY,

To EDWARD DOBYMS,

Dr.

“To one month's rent for house in Morgan-street, St. Louis, at \$29 67;—month ending on the 23d March last.

“Credit, by one grate and fixtures, \$10.—Balance due, \$19 67.”

Upon this complaint a summons issued, a trial was had before the justice, and the plaintiff, Dobyms, recovered a judgment for the amount specified in his account.

Upon appeal to the Court of Common Pleas, where, in conformity to the provisions of our statute, the case was tried *de novo*, the plaintiff gave in evidence an agreement under seal, by which Dobyms rented to Garvey the house on Morgan-street for three years, Garvey agreeing to pay, as rent, at the rate of three hundred and fifty dollars per annum, to be paid quarterly. An endorsement appeared on the back of this lease in the following words:—“I hereby cancel this lease, and exonerate C. Garvey from further responsibility or liability on account of same, from and after this date.—St. Louis, 23d March, 1842.

“E. DOBYMS.”

There was also read an acknowledgment of Garvey, made before the justice of the peace who tried the cause, in the following words:—“I, Ch. Garvey, do hereby acknowledge that the lease upon which I held the house aforesaid was cancelled, and rendered null and made void by my consent, with above-named plaintiff, on the 23d March, 1842.

“C. GARVEY.”

The plaintiff then offered to prove by parol, use and occupation of the premises by the appellant, up to the time of the cancellation of said agreement, but the evidence was objected to, and the Court of Common Pleas ruled the evidence inadmissible. No other evidence than the writing above specified was given, and upon this state of the facts the court was called upon to decide that the plaintiff could not recover, but the court refused so to decide, and gave judgment for the amount of plaintiff's demand before the justice.

A motion for a new trial was made upon the several grounds, which was overruled, and exceptions taken to the opinion of the court.

The action on the case for use and occupation was first given in England by the statute of 2 George II., ch. 19, sec. 14, which provided, that “landlords, *where the agreement is not by deed*, may recover a reasonable satisfaction for the lands, tenements, or hereditaments, held or occupied by the defendant, in an action on

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the case for the use and occupation of what was so held or enjoyed; and if, in evidence on the trial of such action, any parol demise or any agreement, (not being by deed,) whereon a certain rent was reserved, shall appear, the plaintiff in such action shall not, therefore, be nonsuited, but may make use thereof as an evidence of the *quantum* of damages to be recovered." (2 Selw. N. P., 1078.) The statute is substantially copied in our acts concerning landlords and tenants. (Revised Code, 1835, p. 277.) Before the statute of George II., ch. 19, debt or covenant was the only remedy for rent in arrear, and *indebitatus assumpsit* would not lie.

The statute is expressly confined to cases where the agreement is not by deed, and it is well settled, that an action of assumpsit for use and occupation will not lie where rent is reserved by deed, the proper action in such cases being debt or covenant.—Codman and Othres vs. Jenkins, 14 Mass. Rep., 95.

If the suit before the justice is to be regarded as an action of assumpsit for use and occupation, the deed from Dobyns to Garvey was inadmissible, and the plaintiff was not entitled to recover in that form of action. It cannot be very material, however, under our laws, in what particular form an action is commenced before a justice of the peace, provided there be a substantial cause of action, and due notice given to the adverse party, of the nature of the demand, either by a bill of items, (Rev. Code, 1835, p. 351, sec. 9,) or by filing with the justice the instrument of writing, where such instrument is the foundation of the demand, (Rev. Code, 1835, p. 350, sec. 6,) or by a verbal statement made at the instance either of the defendant or the justice, of the nature of the demand. (Rev. Code, 1835, p. 354, sec. 8.) This suit may be regarded, therefore, as an action of debt for rent arrear, looking at the proof upon which alone the action was sustained; for the action of debt for rent in arrear, though founded on a deed, is an exception to the general rule, that wherever an action is founded on a deed, the deed must be declared on, and in this case it is not necessary to declare on the deed. (1 Selw. N. P., 450.) It was therefore unnecessary for the deed to be filed with the justice before process issued.

Viewing the action in this light, it cannot be material whether the cancellation, being by parol, was effectual or not, inasmuch as the suit was brought for arrears of rent, accruing under and by virtue of the lease, previous to its supposed cancellation. Could the plaintiff, then, recover for one month's rent in arrear, under a lease by which the defendant was only bound to pay at the end of every three months? Taking the lease by itself, and without reference to the agreement for cancellation, it seems beyond dispute that the plaintiff could not have a cause of action under that lease, until some one of the quarterly payments was due.

We give no opinion in relation to the cancellation of the lease by Dobyns, and the agreement of Garvey entered before the justice, forasmuch as the action here was clearly not founded upon a supposed contract between the parties, apart from the lease.

Judgment reversed.

Cason, Administrator, vs. White.

CASON, ADMINISTRATOR, vs. WHITE.

A party possessing a community of interest in the subject-matter, is, nevertheless, a competent witness, unless the record of the judgment would be evidence for or against him.

ERROR to Howard Circuit Court.

CLARK, for Plaintiff in Error.

The only question made by the bill of exception in this case is, as to the correctness of the judgment of the Circuit Court in allowing one of the donees in the deed, Martha Ann Partlow, to give evidence in the cause on the part of the defendant.

The plaintiff contends, that the witness, being a party to the deed, and claiming under the same, was interested, and therefore could not legally testify for the purpose of establishing the deed under which she claimed, and to which she was a party.—2 Starkie's Ev., 748, 9, and notes and authorities there cited.

DAVIS, for Defendant in Error.

The defendant insists that the witnesses were not incompetent, the subscribing witness being out of the United States.

The fact that the witnesses are donees of certain slaves in the same deed of gift, is no objection to their competency, they having no interest in the slaves sued for in this controversy. (See 1 Phillips' Ev., 45, 46; 2 Cowen and Phillips' edition, 86, note 84 of same work: also see 2 Starkie's Ev., 744, 747, title, "Interested Witnesses.")

The record of this cause could not be used in evidence for or against the witness.—See 3 Johns. Cases, 82; 5 Johns., 256.

The subscribing witness was not within the State or United States—proof of his hand-writing was therefore properly received.—See 1 Phillips' Ev., 473.

NAPTON, J., delivered the opinion of the Court.

This was an action of trover, brought by plaintiff, to recover the possession of certain slaves, mentioned in the declaration.

Upon the trial, the defendant offered in evidence a deed from one Elijah Partlow, purporting to convey certain slaves to Mary E. White, his daughter, and wife of the defendant; and also certain other slaves to two other children, Martha Ann Partlow and James Partlow—which deed was signed by said Elijah Partlow, and attested by W. L. White and Thomas Moore. The defendant being himself one of the subscribing witnesses, offered to prove, and did prove, that the other witness, Moore, lived in Texas, and then offered to prove the execution of the

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deed by Martha Ann Partlow, one of the donees in the same deed. To this objections were made, but the court admitted said Martha Ann to be examined, and this is the only error assigned.

A party possessing a community of interest in the subject-matter, is, nevertheless, competent, unless the record of the judgment would be evidence for or against him. (2 Starkie's Ev., 781.) Thus, one seaman may be a witness for another in any suit respecting the same voyage, for although interested in the question, he is not interested in the event of the suit. (Hoyt vs. Wildfire, 3 Johns. Rep., 518.) As the verdict in the present case would be inadmissible, either for or against the witness, she being neither a party or privy, we are of opinion that the Circuit Court properly admitted the evidence.

Judgment affirmed.

BROADDUS vs. WARD ET AL.

B. contracted, in 1825, with the proprietors of the town of Rocheport, for the purchase of a lot in that town, by which he bound himself to erect on said lot a dwelling-house of a certain description, within two years, otherwise the lot was to revert to the proprietors. B. neglected to build any house on the lot, and the court being of opinion that he had no sufficient excuse for failing to comply with his contract in this respect, refused to decree a specific performance. Equity cannot relieve against a forfeiture where the party applying for relief is in default.

ERROR to Boone Circuit Court.

TODD, *for Plaintiff in Error*, relies upon the following points:—

1. The decree should have been for complainant.

There had been a waiver of the forfeiture upon all lots, at the sale, the complainant purchased.

2. The forfeiture could have been compensated for in damages, and the court should have directed the inquiry.

3. The purchase money should have been refunded.

4. The defendants, re-selling the property, had no right to enforce a forfeiture.

ROLLINS, *for Defendants*, relies upon the following points:—

1. Under the written agreement, the complainant, Broaddus, was bound to improve the lot purchased by him, by erecting, within two years, on the same, a log house, 18 by 20 feet, and finished so as to be tenantable, and on his failing to

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do so, the lot, by the terms of the agreement, reverted to the proprietors, unless they waived the necessity of the complainant making such improvement.—Newland on Contracts, ch. 12; Sugden on Vendors, ch. 8; 2 Bibb, 78; 1 Johns. C. Rep., 369; *Benedict vs. Lynch*, 13 Vesey, 224; 3 Monroe, 318, *Mason vs. Chambers*; 4 Littell, 200, *McKinley vs. Butler*.

2. There is no evidence going to show, that the proprietors of Rocheport ever did waive the necessity of Broadhus' making the improvement stipulated for in the agreement.

3. The court below did not err in rejecting the testimony as marked in the bill of exceptions, because the same was irrelevant and improper, and because most of said testimony is the mere repetition by the witnesses of what was said to them by third persons.

4. The court below did not err in rejecting the evidence of Jesse B. Dale, as marked in the bill of exceptions, going to show that the time for making the improvement upon the lot bought by the complainant was prolonged, because there was no allegations in the bill to justify such proof.—5 Mo. Rep., 141, *Moore and Porter vs. McCulloch*.

5. That even if additional time was given by the proprietors, to complainant and others, to make the improvement stipulated for in the original agreement, still Broadhus has forfeited all right to the lot, for his continued failure to make any improvement on said lot whatever, within such time as might have been given him.

6. That the failure of complainant to improve the lot purchased by him, according to the agreement, for years after he should have improved it, justified the conclusion, on part of the defendants, that he had abandoned his claims thereto.

TOMPKINS, Judge, delivered the opinion of the Court.

Jeremiah Broadhus, the complainant in the Circuit Court, states in his bill, that, on the seventeenth day of November, in the year 1825, he contracted with, and became the purchaser from, John Ward, Lemon Parker, Abraham Barnes, and John Gray, of a certain lot of ground in the town of Rocheport, Boone county, known on the plat of said town as lot No. (45,) for the sum of \$47 50, payable in two equal instalments, at six and twelve months after the day of said purchase; that the said John Ward, Lemon Parker, Abraham Barnes, and John Gray, were, at the time aforesaid, proprietors of the land, and laid out thereon the said town of Rocheport, and that said purchase was evidenced by a writing signed by the said proprietors, in which they agreed, that if the said purchase money should be paid, and if a house should be built on said lot within two years, of not less value than a log house 18 by 20 feet, and the same be finished so as to be tenantable, then the said defendants would convey to the plaintiff, by deed, &c., said lot, otherwise, the said agreement should be null and void, and the lot should revert to the proprietors; that, subsequently to the sale of said lot to him, the said John Gray sold all his right to the said land and premises within said town to one Joshua Newbrough, who sold the same to William Gaw by deed in fee simple, and

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that also subsequently to the said sale, the said Abraham Barnes sold all his interest in said town, and the land out of which the said town was taken, to one Robert S. Barr in fee simple; and that the said purchasers, William Gaw and Robert S. Barr, had full notice of the plaintiff's claim to said lot at the time of their making the purchases aforesaid; that he had fully paid the purchase money of said lot to the said Ward, Parker, Barnes and Gray, at the time it became due; that about this time said Parker departed this life intestate, leaving a widow and two children; that the said Ward and Parker, and the said Barnes and Gray, who executed the title bond or agreement aforesaid, for the lot aforesaid, after the payment of the purchase money aforesaid, by the plaintiff, did release, acquit, and discharge the plaintiff, and all other persons who had purchased lots from them in said town of Rocheport, from any obligation to improve said lot, but that, subsequently thereto, whilst the plaintiff was in full possession of said lot, after paying for it as aforesaid, in the month of January, 1836, the then pretended owners of the said land, and the lots in said town, John Ward, William Gaw, Robert S. Barr, and the widow and heirs of said Parker, through their agent, George Knox, addressed a letter to the plaintiff, requiring him to improve the said lot during that year, and that he, the plaintiff, having his own interest in view, did undertake, and was about, to improve largely upon said lot by erecting a brick house thereon during that year, viz., 1836, but was hindered and prevented by them, the said John Ward, William Gaw, Robert S. Barr, and the widow and children of said Lemon Parker, and that they thereupon took possession of the said lot against the will of the plaintiff, and at a public sale, made by them, they set up and sold the said lot, in several parcels, to the highest bidder, and that Edward Camplin, Andrew McQuilty, Nimrod Dickerson, John McClintock, John and David W. Alexander, and William Gaw, each purchased separate parts and parcels of the same, and as this plaintiff believes, obtained from the said proprietors written evidence of said sale; that at said sale he gave notice, and fully apprized said purchasers, of his title and claim to the said lot; that, since said purchase by Andrew McQuilty, he hath sold and conveyed his interest therein to one William Davidson, who is made defendant hereto, and that said Davidson, when he made said purchase, had notice of the plaintiff's claim, and that the said John and David W. Alexander, since their purchase of a part of said lot, have sold and conveyed their title to one John M. McGee, who is prayed to be made defendant hereto, and that said McGee had notice of the plaintiff's claim.

The bill then prays that the defendants be decreed to convey to the complainant, &c.

The defendants, Barnes, Ward, Gray, Gaw, Parker, &c., admit, that the complainant purchased the lot from the original proprietors of Rocheport, John Ward, Lemon Parker, Abraham Barnes, and John Gray, about the year 1825, as in his bill of complaint is stated, and on the conditions therein mentioned; that since the purchase of said lot by the complainant, Broaddus, said John Gray sold all his interest in the land and lots within the town to one Joshua Newbrough, and that he, as they are informed, sold the same to William Gaw, aforesaid. They further state, that one of the other proprietors, as they are informed, Abraham Barnes,

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sold and conveyed all his interest in said town, some time in 183—, to one Robert S. Barr, and that said Gaw and Barr admit, that they had notice of the complainant's purchase of the lot aforesaid, and that they had heard and believed that he had both forfeited and abandoned his contract, as appears by his own admissions, and the inspection of his title-bond.

They admit, that they had heard that the complainant had purchased a lot, as is in his bill of complaint stated, and also, that he had paid for it, but they require it to be proved.

They expressly deny, that said Ward, Parker, Barnes, and Gray, or either of them, did, at any time, whilst they had any claim in said town of Rocheport, release, discharge, or in any manner acquit said complainant from his obligation to improve said lot precisely according to the stipulation of said title-bond, as stated in the bill of complaint exhibited to the court. They deny, also, that the proprietors ever did consider the complainant in the legal possession of said lot, after his failure to comply with his contract. They admit, that George Knox wrote a letter to complainant, who then resided in the State of Kentucky, and, as they have understood, that he wrote said letter at the instance and request of one who was interested in said town of Rocheport, the date and contents of which communication they will not now pretend to repeat; and they contend, that they cannot be now accurately collected from the torn, mutilated, and defaced copy which the complainant has exhibited, and they deny that there is any requisition contained in said letter, on him, to improve said lot; but say, that it was distinctly therein stated to him, in said letter, that the lot, according to the title-bond, had reverted to the proprietors, and that there is no intimation, even in said letter, except the unauthorized opinion of the agent, that the then proprietors of said town of Rocheport did not intend to hold said lot. They deny any knowledge of the complainant being about to improve largely on said lot, by erecting brick houses thereon, in the year 1836, and do not believe that he ever had any such intention; and they say, that they would not have permitted him to do so without another distinct purchase from those entitled to sell. They deny having taken possession of said lot illegally, but state they paid for their respective shares a valuable consideration. They admit the sale of the lot, as stated in the bill, to Edward Camplin, Andrew McQuilty, Nimrod Dickerson, John McClintock, John and David W. Alexander, and William Gaw, and that it may be conveyed to them according to their respective shares; that they understood, that at the time of the sale of the said lot the complainant did forbid the sale. They admit, that they have understood that said McQuilty has sold his interest in said lot to William M. Davidson, but they know nothing of Davidson's knowledge of the complainant's claim thereto; that they have also understood, that John and David W. Alexander have conveyed their interest to John McGee.

They admit their refusal to convey said lot to said Broaddus, and deny all charges of combination and confederation, to cheat, &c. John McGee answered separately, that he had purchased from John and David W. Alexander their portion of said lot, but denies making the purchase with full knowledge of the complainant's claim; says, that he had heard the lot called the Broaddus lot, at

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the time of sale, but denies that he had any knowledge of the complainant's claim, or pretence of claim, to said lot. Wm. M. Davidson answered separately, that he had no knowledge of the complainant's claim, and denies that he purchased from Andrew McQuilty, and states that he purchased from John R. Clark. Andrew McQuilty admits that he purchased a part of said lot, but denies any notice of the complainant's claim thereto, and says that he did not hear the complainant, at the sale, when he (McQuilty) purchased, give notice of his claim. Replications, &c., were filed, and the court, after hearing the evidence, dismissed the plaintiff's bill of complaint.

On the bill of exceptions this testimony is found:—Tyre Harris states, that some time since the year 1830, he had a conversation with Michael Woods, deceased, in which Woods told him he had received a letter from the complainant, Broadbuss, desiring him to accept an agency over a certain lot belonging to him, Broadbuss, situated in Rocheport, and that Broadbuss wished him to make certain improvements on the lot, and to retain a lien on the property until he should be reimbursed by the complainant for the amount expended in such improvement. The witness thought the building was to be large, and probably of brick.

George Knox stated, that in 1834 he became agent for John Ward in the management of his business generally in Missouri, and that he thought it advisable, with the consent of William Gaw, to write to Broadbuss concerning the lot in question, and that the letter was substantially as follows:—

“*Rocheport*, January 15th, 1835.

“I, acting as the agent of John Ward, and at the request of one of the other proprietors of Rocheport, want to know what disposition you intend making of the lot purchased at the first sale. It is in a good situation for business of any kind, and — is important to the town that it be improved. The lot, according to the condition of the title-bond, has reverted to the proprietors, but I do not think they have a disposition — it, — provided it should be well improved in the course of the summer, which it would be best for you to do, or dispose of it to some one who would, or they will take it into their own hands again, as —. You will please write to Mr. William on the subject soon.

“Respectfully,

“GEORGE KNOX.”

This witness stated, also, that in the year 1835 Robert S. Barr acquired the interest of Abraham Barnes in said town of Rocheport, and that he related to Barr, as nearly as he could recollect, the letter which he had written to Broadbuss, and that Barr expressed a willingness to confirm the title to Broadbuss, if he should comply with the proposition made to him; that the letter mentioned is the same as the mutilated letter attached to the bill, and marked No. 2. The witness did not recollect that either Mr. Broadbuss, or any agent of his, was prevented or forbidden to erect a building on the lot during the year 1835; but previous to the sale of lots in 1836, the proprietors came to the conclusion that Mr. Broadbuss had forfeited all claim to the lot, and determined to have it sold.

The testimony of James Woods fixes the time at which the plaintiff, Broadbuss, applied to Michael Woods, deceased, to improve the lot in question for him.

This witness stated, that the deceased, who was his father, told him that

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Broaddus applied to him by letter in 1834. The witness had never seen the above-mentioned letter of Broaddus, either before or since the death of his father. He further says, that he does not know that his father ever made any agreement with Broaddus to improve the lot.

One other witness, Grubbs, stated, that the sale took place in November, 1825, and that he lived on the town site till the year 1829, and that late in the spring or early in the summer 1836, the then proprietors, Ward, Gaw, and others, refused to permit Michael Woods to improve the lot, on the condition of making a title to it.

Another witness stated, that some improvements in the town were made in 1831, but the principal improvements were made in 1832. In 1831 and '2, when business began to improve, the proprietors prolonged the time, and that, in 1836, Broaddus forbade the sale of the disputed lot.

It is nowhere attempted to be proved, that the first proprietors of the town of Rocheport did release, discharge, or acquit either Broaddus, the plaintiff, or all the other purchasers of lots from them in said town, from any obligation to improve their lots.

The plaintiff does not state, that the actual proprietors, against whom he commenced this action, did release, discharge, and acquit him from improving the lot, but that subsequent to the release, &c., of the original proprietors, whilst he was in full possession of said lot, &c., about January, 1836, the then pretended owners of lots, &c., in said town, to wit, John Ward, William Gaw, &c., by their authority, through their agent, George Knox, addressed him a letter, requiring him to improve said lot during that year; and he alleges, that having his own interest in view, he did undertake, and was about to improve largely on said lot, by erecting a brick house thereon during the said year, 1836, but that he was *hindered and prevented* by them, the said Ward, Gaw, and Barr, and the said widow and heirs of Lemon Parker.

The copy of George Knox's letter exhibited with the bill, shows as its date "January 15," without any year annexed, although it had been in the possession of Broaddus himself, and Knox, in his deposition, states, that it was written and dated on the 15th January, 1835, and denies that he was authorized by the proprietors to do so: he restores the letter exhibited as well as his memory will enable him. It was admitted and proved to be much mutilated. Knox denies that he wrote that letter by the authority of the proprietors. He says he had, in 1834, received a power of attorney from Ward to attend to his business generally in Missouri, and with other business to attend to the sale and management of his property in Rocheport, and that he thought it advisable, with the consent of Gaw, one of the proprietors, to write to Broaddus. This letter, as restored, has been set out, and there is nothing in it inconsistent with the mutilated copy exhibited. Even admitting that Knox's letter was the authorized act of the proprietors, the plaintiff has given no evidence of any act done by him in 1835 towards building or improving the lot; but in 1836 a man came to Rocheport, who called himself the agent of Broaddus, and offered to improve the lot, when the proprietors had resolved to hold the lot themselves.

We collect from the evidence of Tyre Harris, and of James Woods, son of

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Michael Woods, deceased, that in the year 1834 the deceased told them that he had received from Broaddus, residing in Kentucky, a letter requesting him to build on the lot, and retain it till he paid himself by the rents and profits for his expenditures, and that Woods declined doing it. This evidence was excepted to, and it does seem curious that any lawyer should ever offer such in any cause—nothing but hearsay to prove a particular fact—which if it had been proved by Michael Woods himself would have amounted to nothing.

But the plaintiff contends, that having performed a valuable part of the agreement, he ought to have a specific execution of the contract, and they rely on Fonblanque's Equity, p. 395. It is there said, that if a man had performed a valuable part of the agreement, and is in no default for performing the residue, then it seems but reasonable he should have a specific execution of the contract, &c.; for, since he entered upon the performance in contemplation of the equivalent he was to have from the person with whom he contracted, there is no reason why this accidental loss should fall upon him more than upon the other. In 1825, Broaddus is shown, on record, to have purchased this lot, and the proprietors are shown to have extended the time of making the improvement from time to time. No improvements are stated to have been made before the year 1831, but the principal were made in the year 1832, when the time, according to one of the witnesses, was still further prolonged, but for what length of time it is not ascertained. In 1834 we find Broaddus in Kentucky, and when or why he went is not explained. It is not pretended that his absence was procured by any act of the proprietors, or that he was prevented by any unavoidable accident from improving this lot, and consequently he cannot bring himself within the provision of the passage referred to in Fonblanque. If ever there was a case in which equity would refuse to relieve against a forfeiture, this ought to be one. The lot had been purchased eleven years before the second sale; and although Knox, in his testimony, denies that he wrote the letter by the authority of the proprietors, yet he leaves it to be inferred, that if Broaddus had, even in the year 1835, improved the lot according to contract, the proprietors would have made him a title. The principal improvement had been made in 1832, seven years after the first sale, and the property had thereby been greatly increased in value, at the risk and expense of others, when this man had withdrawn himself to Kentucky, and not till 1834 is he found, by hearsay evidence, to have opened a correspondence with Michael Woods, to procure him to improve this lot at Woods' own expense, and in 1836 he forbids the sale, claiming the lot nine years after it was forfeited. In *Stevenson and Wife vs. Blight's and Dunlap's Heirs*, 7 Monroe, 142, (another of the plaintiff's references,) we find the same rule laid down as in Fonblanque—all very good law, and a state of facts to suit the law is all that is wanting. It is stated, in 1 Maddock, 37, that relief will, under certain circumstances, be given upon a breach of covenant by a lessee, as to the mode of cultivation, &c. And in a case where the tenant had omitted to keep the premises in repair, as he had covenanted to do, &c., relief was given. But Lord Eldon seems not to have concurred in these decisions, or to admit that relief could be administered, unless in cases of accident and surprise, &c.; and it seems clear, that if the tenant's

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conduct with reference to his covenant has been gross and ruinous, relief would not be granted him. This is another citation of the plaintiff. What can, it may properly be asked, be more grossly negligent than the conduct of the plaintiff in this case? Six years after the first sale, the proprietors still forbearing, the purchasers began to improve, and in the sixth and seven years improvements were made greatly enhancing the value of the property. All that the plaintiff, in the mean time, has done, as appears in evidence, is to write to Michael Woods in 1834, two years after the other purchasers had, by their industry, given value to the town property, to build a brick house, and to keep it till, by the rents, he had paid the expense of building, and this, too, is only known as the report of what two of the witnesses say that Woods in his lifetime told them, and two years still later he proves that he forbade the sale. No accident or surprise has been attempted to be proved; it is useless, then, to inquire whether any of the defendants were affected with notice of his claim.

The decree of the Circuit Court, dismissing the cause, is affirmed.

VAULX vs. CAMPBELL, EXECUTOR, &c.

1. An instruction not predicated on the evidence in the cause is erroneous: so is an instruction which, in effect, tells the jury that they must believe the evidence.—See *Bryant vs. Wear and Hickman*, 4 Mo. Rep., 106.
2. A party must not only object, but must tender his exceptions to the opinion of the court overruling his objections.—See *Shelton vs. Ford and Whitehill*, 7 Mo. Rep., 209.
3. The judgment of the court below will not be reversed on account of erroneous instructions given, when it is apparent that the party complaining has sustained no injury thereby.—See *Newman vs. Lawless*, 6 Mo. Rep., 301; *Finney et al. vs. Allen*, 7 Mo. Rep., 419.

ERROR from Greene Circuit Court.

WINSTON, for Plaintiff in Error.

1. The court erred in permitting the declarations of the Sims' to go to the jury, such declarations being no more than hearsay evidence.
2. The court erred in giving the defendant's instruction, such instructions leaving the jury to judge of what constituted a legal title to the property.

PHELPS, for Defendant in Error.

1. That court did not err in admitting the declarations of the young Sims' as to the ownership of the property, as they were in possession of the same.

2. That if the sons of deceased held themselves out to the world as the owners of the property, and defendant intermeddled with it by their consent, this will not render him liable as an executor *de son tort*.—1 Com. Dig., 378, chap. 2; 1 Esp. Nisi Prius, 251; 1 Esp. Rep.

3. That plaintiff has not shown that defendant was an executor *de son tort*, and the verdict is therefore for the right party.

4. That if improper evidence was received, the court will not set aside the verdict, provided there be sufficient evidence without it to authorize the finding of the jury.—1 Taunton, 14.

And if, on the whole, judgment is given for the right party, it ought to stand.—1 Mo. Rep., 163, 313, 588, 746.

TOMPKINS, J., delivered the opinion of the Court.

Joseph Vaulx commenced an action of debt in the Circuit Court of Greene county, against John P. Campbell, and the judgment of that court being rendered against Vaulx, he brings his writ of error to this Court, in order to reverse the judgment of the Circuit Court.

The suit was brought on two single bills obligatory for \$325, each made by Isham Sims, sen., deceased, and to maintain his suit the plaintiff introduced evidence to prove that Campbell, the defendant, had become liable as his executor of his own wrong by intermeddling with the property of the deceased.

After giving the bills in evidence, the plaintiff proved that Isham Sims, who executed said instrument of writing, died in the year 1835, and had never been in this part of the State, viz., Greene county; that he died possessed of ten or twelve negroes, two wagons and teams, and household and kitchen furniture, and that said property was brought here by Isham Sims and Thomas Sims, sons of the deceased; that said negroes were worth, on an average, about five hundred dollars each; that in the year 1806 or 1807, the defendant was going to the South with some negroes of his own, and young Isham Sims, son of said deceased, took the negroes of the deceased, and went with the defendant.

The witness stated, that he had a demand against the said deceased, and that the defendant gave his note for the amount, which was about forty dollars. The witness then understood that young Isham Sims had secured the defendant for it. The witness saw, with the stock of the defendant, a mare, which had been owned by said Isham Sims at the time of his death, worth about fifty dollars.

The defendant then asked the witness to state what Isham Sims, deceased, told him in his lifetime about the manner in which he came to the possession of some of said negroes; to which question the plaintiff objected, and the witness was permitted to answer the question, and the plaintiff excepted to the opinion of the court. The witness then stated that Isham Sims, the deceased, told him that he took six of those negroes from his father, without leave, in 1834 or 1835. The witness then being interrogated by the defendant, stated that the family of the said deceased did claim and use said property as their own, and exercise over it the rights of ownership by hiring, selling, &c.; that the six negroes which Isham

Sims, the deceased, took from his father, were brought back; but that a negro woman and her two children were not brought back, and that said woman and her children were worth one thousand dollars; that Isham and Thomas Sims, sons of the deceased, called the property their own.

The plaintiff then proved, by another witness, that he saw the said negroes in the possession of young Sims; that the defendant and young Sims went off together with the negroes, and with a wagon and team which young Sims called his own, the defendant taking away some of his own negroes; that after the defendant returned, he said he could have sold the negroes better, but Sims would not allow them to be separated. The witness being asked whether the defendant meant that he or Sims could have sold the negroes better, replied, "judge for yourselves," repeating what he had before said. This took place in the year 1837. The defendant proved that young Sims exercised the rights of ownership over these negroes, and other things not thought material to notice here.

No other testimony was given in the cause by the defendant. The plaintiff then proved that young Isham Sims said that the defendant sold the negroes while he was sick, and that the tavern-keeper told him, said Sims, that he was raised up in the bed, to sign the bill of sale; that said Sims also stated to witness, that there was a difference betwixt himself and the defendant about a draft, for which the negroes, taken away by young Sims and the defendant, had been sold; that young Sims told the witness they were both interested in it, and that the defendant held it and refused to give it up, until some demands which the defendant had against young Sims were satisfied or secured; that the defendant told the witness he had some demands against said Sims, and would not surrender the draft.

On a review of this evidence, the plaintiff in the action is found to have produced no evidence against the defendant stronger than this, that the defendant was going to the South with some negroes and stock of his own, and that young Isham Sims went with him, taking along with him the negroes of the deceased, Isham Sims, his father; and that the witness saw a mare among the stock of the defendant, which had belonged to the deceased father of young Sims. But it is not even intimated that the defendant claimed the mare, and it is obvious, if young Sims did claim the mare, that he could not have kept company with the defendant without suffering the mare to run with the drove of the defendant.

The defendant, in the cross-examination of the plaintiff's witnesses, brought out some evidence which the court, contrary to the plaintiff's wish, permitted to go to the jury, and the plaintiff duly excepted to the opinion; for what good reason is not so obvious, as the defendant in that cross-examination seems to have done more to convict himself than the plaintiff had done. The second witness of the plaintiff stated, that the defendant said, after his return, that he would have sold the negroes better, or that the negroes could have been sold better, but Sims would not allow them to be separated. It is evident, from this expression, that Sims acted as master and owner in not allowing the negroes to be separated, and still it is attempted to make the defendant liable, not because he said he did sell them, but because he could have sold them better if, &c. He might also have said that he could have sold them better if they had been his property; this would

have been equally as good evidence to convict him of intermeddling with the property of the deceased, as the other. But the plaintiff introduced a witness to prove, by the declarations of Sims himself, that there was a jar betwixt plaintiff and defendant about a draft, for which the negroes taken away by Sims and the defendant were sold, and that both plaintiff and defendant were interested in said draft. No exceptions being taken to this evidence by defendant, it must pass for what it is worth. The evidence shows that Campbell, the defendant, carried to the south negroes of his own, and he might well have been interested in the draft by a sale of his own negroes.

But the defendant, after injuring himself by the cross-examination of the plaintiff's witnesses, asks the court to instruct the jury, that if they believe, from the evidence, that the defendant has made out a *prima facie* legal title to all property which belonged to Isham Sims, deceased, which came to the hands of the defendant, they must find for the defendant.

This is certainly a very exceptionable instruction; first, it appears, to me, that there was no evidence on which such an instruction could have been predicated, and this, it seems to me, the defendant's interest required him to make out; second, if there had been any such evidence, this instruction amounts, as was held in *Bryan vs. Hickman and Wear*, (4 Mo. Rep., 106,) to telling the jury they must believe that evidence. To the same purpose, see *Speed vs. Harris*, *Ibid.*, 356. To this instruction the plaintiff objected, but he did not except to the opinion of the court overruling his objection; and in *Shelton vs. Ford et al.*, (7 Mo. Rep., 211,) it is decided by this Court, that "it is not sufficient to say that he objects, he must save his objection on the record by excepting to the opinion of the court in overruling his objection." I am not prepared to say that this judgment ought to have been reversed, even if this instruction had been excepted to. For, after carefully examining the plaintiff's evidence, I have not been able to find any evidence of a conversion by the defendant which ought to have induced him to hazard this suit, and I am induced to believe that the defendant asked this instruction under a mistaken apprehension of the state, both of the plaintiff's evidence and of his own, as sometimes happens in the bustle and confusion of a crowded court-house. The plaintiff, then, could sustain no injury by this mistake of the court in giving this instruction; and even if it had been excepted to, it ought not to be cause for reversing this judgment.—See *Finney et al. vs. Allen*, (7 Mo. Rep., 416,) where it is said the judgment of the Circuit Court will not be reversed on account of an erroneous instruction, when it is apparent from the record that such instruction could not have been prejudicial to the party complaining.—See also *Newman vs. Lawless*, 6 Mo. Rep., 279.

The plaintiff moved for a new trial for these reasons—

- 1st: Because the court erred in instructing the jury;
- 2d: Because the court permitted improper evidence to go to the jury;
- 3d: Because the verdict is against law and evidence.

First: It was shown above that the judgment ought not to be reversed, first, because the plaintiff did not, by excepting to the opinion of the court, save his objection to this instruction; and, secondly, because he could not, in any event, be

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prejudiced by the instruction, as he had not given any evidence of a conversion by the defendant of the goods of the deceased.

Second: The declarations of the deceased, Isham Sims, made to the plaintiff's first witness, which the defendant drew from the witness on cross-examination, ought not to have been given in evidence. But this could do no injury to the plaintiff, who had proved nothing against the defendant.

Third: The finding of the jury, is, as it seems to me, consistent both with the law and evidence.

It is the opinion of the Court that this judgment be affirmed.

GARESCHÉ vs. BOYCE.

1. An instruction, "that the plaintiff has shown a *prima facie* right to the possession" of the property in controversy is erroneous, as amounting to an instruction that the jury must believe the facts on which the instruction is founded.
2. Plaintiff brought an action of trover against defendant for certain cord-wood taken from his land by the latter. Defendant purchased the wood at sheriff's sale on execution against one L., who, it appeared, from declarations made by some of plaintiff's witnesses, had a lease from plaintiff to cut and sell the wood. *Held*: That plaintiff could not maintain his action.

ERROR to St. Louis Circuit Court.

LAWLESS, for Plaintiff in Error.

The plaintiff refers the court to the evidence in the case, and to the following amongst other authorities:—"A mere possessory title in the lessee of the plaintiff, on whose possession the defendant, without claim or color of title, entered, will be sufficient to enable him to maintain this action."—2 Johns. Rep.

"Possession of land by a party claiming it as his own in fee, is *prima facie* evidence of his ownership and seizin of the inheritance."—7 Wheat. Rep., 59.

"In ejectment, possession accompanied with a claim of ownership in fee is *prima facie* evidence of such an estate."—Jackson vs. Partin, Paine's United States Circuit Court Reports, 457.

"A deed of bargain and sale in New Jersey passes the possession without entry by bargainee—L. Washington's C. C. Rep., 38.—Same doctrine in Missouri; see Price's Case, 1 Mo. Rep.

"A landlord has such a property in timber cut down during a lease as to enable him to support trover when it is carried away."—7 Tenn. Rep., 13; 1 Saund. 332.

"When a debtor confesses a judgment, and fraudulently procures goods, to be

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delivered without having paid for them, with intent to subject them to the execution of a judgment creditor, the title to the goods does not become vested in the purchaser."—*Van Classon vs. Fleet*, 15 Johns. Rep., 147.

POLK, for Defendant in Error.

POINTS RELIED ON BY DEFENDANT.

1. The plaintiff cannot complain of injury from the court ruling, that testimony of John Johnson was competent, because the defendant declined to examine said Johnson at all in the cause.

2. The court committed no error in giving the two instructions asked by defendant's counsel.

The bill of exceptions contains no proof of title. The only pretence of proof on this point is, first, the above-mentioned deed, and next, the payment of taxes by plaintiff on the land described in the deed.

The deed, to be sure, is a regular deed from Gabriel Garesche, as aforesaid, to plaintiff, but there is nothing to establish that Gabriel Garesche ever had any title to the land therein mentioned.

As to the payment of taxes, I apprehend it was never before held, that the having land taxed in the name of a particular party, and his paying the taxes so assessed, vested any kind of title in him to the premises so assessed.

3. The court was right in overruling the instructions prayed by plaintiff.

A mere possessory right in the land will not enable the plaintiff below, and appellant here, to maintain this action. He must show himself to be legally entitled to the inheritance of the land. Not even a freehold estate, less than the fee simple, unless it be such freehold estate without impeachment of waste, will authorize the owner of it to maintain the action of trover for wood dissevered from the realty—cut from the land.—2 Sal. N. P., title, "Trover," 517, and authorities there cited.

TOMPKINS, J., delivered the opinion of the Court.

Vital M. Garesche commenced, in the Circuit Court of St. Louis county, an action of trover against William H. Boyce, and judgment being given against him, he comes into this Court to reverse that judgment.

On the trial of the cause, evidence was given that one John Johnson, and another person, had cut wood and put it up in cords, at the point made by the junction of the Mississippi and Missouri rivers, on the bank of each river, and this wood being offered for sale by the sheriff of St. Charles county, Boyce, the defendant, became the purchaser, and took and carried away the wood so sold. The plaintiff then gave in evidence a deed of conveyance from Gabriel Garesche to himself for the land on which it is contended that this wood was cut. This deed is dated the 24th May, 1839, and recites a deed to those under whom the plaintiff claims, dated 19th November, 1839. The land is thus described:—

"All that certain tract or piece of land situated in the county of St. Charles, in

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the State of Missouri, at the point formed by the confluence of the Mississippi and Missouri rivers, containing four thousand and forty arpens, French measure, bounded as follows:—beginning at an elm on the bank of the Mississippi, thence running to the south 677½ perches, thence 110 perches to a boundary stone, &c., thence running south 12 perches to the Missouri river, thence down the Missouri river to its junction with the Mississippi, thence up the Mississippi river to the beginning, excepting, out of the said grant, three hundred and ten arpens of land, part and parcel of the premises above described, heretofore conveyed to John Orton, &c., and also forty arpens, part of said above described premises, before conveyed to Rufus Easten.

The plaintiff, by consent of parties, gave in evidence the following document purporting to be an agreement of partnership betwixt John Johnson and John Honiy, viz.: the aforesaid John Johnson and John Honiy agree to form a co-partnership for the purpose of cutting wood, and to place it on the bank of the river, for the accommodation of steam-boats, as also to bring or convey it to St. Louis for sale. The said firm to be under style and name of Johnson & Honiy. The said co-partnership to continue for one year from the date, viz., 13th August, 1840. The said John Honiy doth hereby agree and bind himself to take an active part in the business, or, otherwise, to furnish a suitable man, who will act in his place, whose duty it shall be to attend to the wood-yard, cord the wood on the bank, receive it from the choppers, also receive money from the steam-boats, keep a book for the purpose of entering all money received from the choppers. The aforesaid will be John Honiy's part of the business, and the said John Johnson doth hereby agree and bind himself to attend to the business of the wood boat, as also to dispose of all wood that the wood boat may bring to St. Louis. The said Johnson doth also agree and bind himself to keep all the books belonging to the concern in such a manner as will be satisfactory to both parties. The proceedings to be rendered from the wood yard once every week or ten days. The said John Honiy does agree to furnish the choppers, &c. This instrument contained some further agreements betwixt the parties, and was executed by each party signing and sealing it. The plaintiff having then previously released the said John Honiy, produced him as a witness, and he stated that about the 14th day of August, 1840, in consequence of the aforesaid agreement of co-partnership of himself, the witness, and the said John Johnson, he, the witness, went upon the point of land situated at the junction of Mississippi and Missouri rivers, in Saint Charles county; that he went on said land on the advice and suggestion of said Johnson, who told him that the point of land aforesaid belonged to the said Garesche, plaintiff in this action, and that plaintiff had made a lease to him, said Johnson, of said land, or some portion thereof, for the purpose of cutting firewood thereon, and selling the same; that said Johnson has never shown any such lease to the witness; that he went on the land unaccompanied by Johnson; that the witness established himself on said point for the purpose of cutting and cording wood, and cording and selling it to steam-boats, and at St. Louis; that the witness continued to cut and cord wood at said place from the time he went there till the 7th or 8th day of June, 1841, and that up to that time they had cut and corded

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about 4082 cords; that there then remained on the point about 2500 cords unsold, which was sold on execution by the sheriff of St. Charles county, as the property of John Johnson, and Boyce, the defendant, became the purchaser, and carried away some and sold the rest; that ever since that time the witness has remained in the occupation of the said land, in the business of cutting and cording firewood, and as tenant to the plaintiff, Garesche, &c. The plaintiff then produced the witness Michael Tesson, who stated that the land described in the deed aforesaid had always, since the date of said deed, (24th July, 1840,) been claimed by said plaintiff as belonging to him, as owner in fee, and that the witness, as agent of said plaintiff, has ever since said conveyance had said land assessed as the property of said Garesche, and has paid taxes thereon in the absence of said Garesche; and the witness further stated, that in the absence of the plaintiff in the summer of the year 1840, the witness being then agent of the plaintiff, was applied to by John Johnson, the aforesaid partner of the said John Honiy, for a certain instrument of writing, the nature of which the witness did not precisely recollect, but believes that said instrument was either a lease from said plaintiff to said Johnson, or a license to cut wood on said land, or on a part thereof, &c., and the witness is unable to recollect what were the stipulations, covenants, or specific terms of said instrument; and the witness further said that there was considerable discussion in negotiation between said Johnson and himself, as agent as aforesaid, on the subject of the security refused by said plaintiff, Garesche, for the payment of the rent, or for the performance of the covenant in the said instrument contained, that at length the witness as agent, as aforesaid accepted one Lawrence Hoyle as security, &c., and witness says that he does not recollect to whom he delivered said instrument whether to said Johnson or to said Garesche, or to any other person, and that he does not know where it is to be found.

The plaintiff having closed his evidence, the defendant produced said Johnson, defendant in the above-mentioned execution, under which the sale of the wood, as aforesaid, was made to the defendant. He was objected to, and the plaintiff excepted to the opinion of the court overruling his objection. The defendant did not examine said witness.

The plaintiff was notified to produce, at the trial of this cause, the aforesaid lease executed by his agent, Tesson. The defendant offered no evidence.

The defendant prayed two instructions, which were given by the court, and excepted to by the plaintiff. As they are the reverse of others asked by the plaintiff, and refused by the court, they will be passed without notice. The plaintiff prayed the court to instruct the jury—

1st: That the plaintiff has shown a *prima facie* right and title to the possession of the wood in question, and is entitled to a verdict if the jury shall be of opinion that said wood has been converted by the defendant to his own use.

2d: That the plaintiff has shown such *prima facie* title to the land, on which the wood in question was cut, as to demonstrate his right to the possession of the wood which was growing thereon, and which was cut on said land.

3d: That the title deed given in evidence by the plaintiff, together with the proof given by him of his possession, claiming as owner in fee under said deed, is

prima facie evidence of right to the possession of the land, and of the wood cut thereon.

4th: That the assessment of the land for taxes, and the payment of said taxes by the plaintiff as proprietor, is sufficient *prima facie* proof of the right of the plaintiff to the said land, and the wood growing and cut upon the said land, during the time that the plaintiff so possessed, and paid said taxes.

5th: That the acknowledgment of John Johnson, (under whom it is in evidence that the defendant claims title to the wood,) that the plaintiff was the owner of the land, and that said plaintiff had right and title sufficient to make a lease thereof to said Johnson, is good evidence against the said defendant of a possession right in the plaintiff to said land, and to the wood cut thereon.

6th: This instruction it is unnecessary to notice.

These six instructions were refused by the court, and the opinion of the court was excepted to. The plaintiff then took a non-suit, and afterwards moved to set it aside—

First, because the court instructed the jury as required by defendant; and,

Second, because the court refused the instructions asked by the plaintiff. This motion was overruled and the opinion of the court was excepted to.

This case will be considered under two heads. First, ought the first four instructions to have been given? Second, what is the effect of Johnson's acknowledgments, as they are proved by the plaintiff himself?

To the first four instructions asked by the plaintiff, there is one objection equally applicable and equally fatal to each. In each instruction the court is required to tell the jury that the plaintiff had such *prima facie* right or title as would entitle him to recover. Such instruction, if given, would amount to telling the jury they must believe the facts on which each instruction is founded.—See *Bryan vs. Hickman and Wear*, 4 Mo. Rep., 106; and *Speed vs. Harris*, *Ibid.*, 356.

Second, the acknowledgments of Johnson, proved by the plaintiff's own witness, are good evidence that Johnson admitted the plaintiff to be the owner of the land, and they would preclude him from denying the right of the plaintiff his lessor, and they must equally prove that plaintiff has no right, as owner of the soil, to the wood cut thereon, either against Johnson himself or against the purchaser at the sheriff's sale, who claims, in virtue of the sale, all the right of Johnson himself.

The plaintiff proved by the witness, whom he introduced to testify to Johnson's declarations or acknowledgments, as the plaintiff calls them, that Garesche, the plaintiff, had given to Johnson a lease to cut and sell wood on the land.

But there is still another reason appearing on this record, why the plaintiff cannot recover on the evidence here given. From the deed under which the plaintiff claims, it appears, that there are two separate parcels of land situated within the limits set out in his deed, which do not belong to him, one parcel of 310 arpens, the other of 40 arpens; and it does not appear that one or both of these tracts may not be the land on which this wood was cut.

For the reasons above given, it appears, that the Circuit Court committed no error in refusing to set aside the non-suit suffered by the plaintiff. Its judgment is, then, affirmed.

Bedford vs. Bradford.

BEDFORD vs. BRADFORD.

The Court adhere to the decision made in *Shreve vs. Whittlesey, Administrator of Whittlesey*; (7 Mo. Rep., 473,) that the term "*beyond sea*," in the first section of the statute of limitation of 1825, means "out of the State."

ERROR to Chariton Circuit Court.

LEONARD, for plaintiff in Error.

POINTS AND AUTHORITIES.

The only question that will be presented to the Court is, as to the true construction of the words, "*beyond sea*," to be found in the statute of limitations of the 21st of February, 1825.

And, since the decision of this cause in the Circuit Court, this question has been settled in favor of the plaintiff in error, by this Court, in *Shreve vs. Administrator of Whittlesey*, 7 Mo. Rep., 473.

TOMPKINS, Judge, delivered the opinion of the Court.

This is an action of debt, instituted by William H. Bedford in the Chariton Circuit Court, against Thomas G. Bradford, on the 9th day of April, 1839, on a bond made on the 17th day of November, 1819, payable to the plaintiff sixty days after date, for eleven hundred dollars.

The defendant pleaded, that the cause of action did not accrue at any time within ten years next before the commencement of the suit.

The plaintiff replied—

1st. That the cause of action did accrue within ten years, &c.

2d. That when the cause of action accrued, the plaintiff was beyond sea, and did not at any time thenceforward, and until ten years next before the commencement of this suit, come, or return, within this State.

The defendant took issues on these replications, and neither party requiring a jury, the cause was tried, without the intervention of a jury, by the court. Upon the trial, the plaintiff gave evidence to prove, that at the time the cause of action accrued, he was a citizen of the State of Tennessee, and residing in the city of Nashville, where he had ever since resided; and that he had never been within this State, until about a month next before the commencement of this suit. This was all the evidence. The defendant gave none.

Then the plaintiff moved the Court to give the following instructions as to the law, viz.:—

1st. That if, at the time when the said cause of action did accrue to the plaintiff, he was in the city of Nashville, in the State of Tennessee, and that the plaintiff did not, at any time, from the time when the said cause of action did accrue, until

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within ten years next before the commencement of this suit, come, or return, into this State, then the issue on the plaintiff's second replication to the plea of the statute of limitations ought to be found for the plaintiff.

2d. That the expression in the statute of limitations of 21st February, 1825, "beyond sea," means, without the jurisdiction of this State.

The court refused to give these instructions, and the plaintiff excepted to the opinion of the court. The plaintiff then suffered a non-suit, with leave to move to set the same aside, and afterwards, on the same day, he moved to set it aside; the court overruled the motion, and refused to set aside the non-suit.

To this opinion of the court, the plaintiff excepted.

This case is the same as the case of *Shreve vs. Whittlesey*, administrator of Whittlesey, in which this Court decided, that "beyond sea" means out of the State. The Circuit Court of Chariton county committed error in refusing to give the two instructions asked by the plaintiff, and it also erred in refusing to set aside the non-suit on the motion of the plaintiff; and for this error its judgment must be reversed, and the cause remanded, to be proceeded in conformably to this opinion.

BOMPART vs. BOYER.

If a party wishes to avail himself of error in the giving or refusing of instructions, he must save his exceptions at the time the instructions are given or refused.

APPEAL from the Court of Common Pleas of St. Louis County.

BOGY and HUNTON, for Appellant.

POLK, for Appellee.

TOMPKINS, Judge, delivered the opinion of the Court.

Pelagie Boyer sued Louis Bompart in the Court of Common Pleas of St. Louis county, where judgment being given for her, Bompart appealed to this Court.

Much evidence was given on each side, and two instructions asked by the appellant were refused. No exception was taken to the refusal of the court to give these instructions.

The court, after the evidence was given in, gave several instructions, none of which were excepted to. After the jury had brought in their verdict, the defendant moved the court for a new trial, for the usual reasons: First, that the

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verdict is against evidence, and against the instructions of the court; and the court gave erroneous instructions, and refused the defendant's instructions.

In the first place, as these instructions given were not excepted to, and as the refusal to give the defendant's instructions was not excepted to, it must not now be expected to reverse the judgment of the Court of Common Pleas on that account.

There was much conflicting evidence, and all the instructions given by the court were hypothetical.

It is impossible for this Court to know what the jury believed. They might well have believed facts to justify their finding, under the instructions of the court. The verdict of the jury appearing to be supported by the evidence in the cause, and no exceptions being taken to the giving or refusing of instructions by the Court of Common Pleas, the judgment must be affirmed.

MEDLIN vs. PLATTE COUNTY.

1. A., as principal, and J. and M., as securities, executed their note to Platte county, for money borrowed. It appeared, upon the trial, that the name of J., one of the securities, had been erased from the note, and M., the other security, offered to prove that the County Court of that county, while in session, *verbally* ordered the name of J. to be erased, without the consent of M. *Held*: That this evidence was inadmissible; that the records of the County Court are the evidence of their official acts; and that all orders not entered on record, are extra-judicial and void.
2. There is a distinction between the *alteration* and the *spoliation* of an instrument, as to the legal consequences. The first is usually applied to the act of the party entitled under the instrument, and imputes some fraud or design, on his part, to change its effect; the other refers to the unauthorized act of a stranger, and does not change the legal operation of the writing, so long as the original remains legible, and, if it be a deed, any trace remains of the seal.

APPEAL from Platte Circuit Court.

JONES and LEONARD, for Appellant.

POINTS AND AUTHORITIES.

1. That the erasure of the name of Johnston from the note, after its execution and delivery to plaintiff, without the knowledge and consent of Medlin, renders the note void, and discharges him from the payment thereof, even though the erasure was made by a stranger, or any other person whomsoever, except it was done by Medlin, and that no action can be brought upon it even in the hands of an innocent holder for valuable consideration.—1 Peters' U. S. C. C. Rep., 560; 6 Mass. Rep., 32; 4 A. C. Law, 278; 5 Monroe's Rep., 32; 1 Wheaton's Selwyn, 547, note 1, 549, top-paging; 4 Durn. and East's Rep., 320; Trin. term, 31 George III., 3 Esp., 57, 246; 4 East, 203; 15 East, 29; 1 Com., 72; 3 Yates, 391; 10 Serg. and Rawle, 428; 6 Serg. and Rawle, 361; 1 Wheaton's Selwyn,

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316, 317; 19 Johns. Rep., 424, top-paging; Chitty on Bills, 203, *b*, note U., 9th American, from 8th London, edit.; 4 Term Rep., 320; 5 Term Rep., 367; 2 H. Black., 141; 1 Austr., 225; S. C. Com. Dig. Fait, F. 1; 6 East, 309; 1 Mo. Rep., 312.

2. That the note was improperly admitted in evidence on the declaration. A variance, however small, in setting out the names, &c., in a bill or note, is fatal. and where the contract stated on the record is, by legal intendment, different from that proved in evidence, the variance will be fatal.—1 Chitty's Plead., 307, 308, 4th American, from 3d London, edition.

If the plaintiff is entitled to recover at all, she can only recover on the common counts, and there being none in the declaration, the note and other evidence ought to have been excluded.—Chitty on Bills, 205, 206, note E., 9th American, from 8th London, edition.

4. That the evidence offered by appellant, and rejected by the court, ought to have been admitted. The County Court is, by law, (Revised Statutes of Mo., 157, 159, part of 15th sec.,) made the general agent of the plaintiff, with full power to control her financial matters. This evidence ought to have been admitted to show the jury by whom and in what way the erasure was made.—See authorities cited as to first point.

4. That the instructions given by the court to the jury, on the part of the plaintiff, ought not to have been given. To show this, see authorities cited as to first point. The treasurer of plaintiff is, by law, (R. S. Mo., 150, art. 1, sec. 3,) made the general agent of the plaintiff, and authorized and required to receive the money due on the note. *Qui facit per alium facit per se*.

5. That the instructions asked by appellant, and refused by the court, ought to have been given. To show this, see N. H. Rep., 145; 11 Mass. Rep., 309; 4 A. C. Law, 280, and authorities cited as to first point.

6. That the verdict is against the law and the evidence.—See authorities cited as to first, second, and fifth points.

7. That the fourth count of plaintiff's declaration is insufficient in law to support the verdict of the jury. The fourth count shows no liability on the part of defendant to pay the amount of said note, and for this reason the count is defective, and the note ought not to have been admitted in evidence on it.—Muldrow vs. Tappan et al., 6 Mo. Rep., 276; 1 Chitty, 329.

8. That all the evidence on the part of plaintiff is illegal, and ought to have been rejected.—See authorities cited as to second point.

TOMPKINS, J., delivered the opinion of the Court.

The State of Missouri sued Hall Medlin and others in debt.

The action was brought on an instrument of writing by which Medlin and two others promised to pay to the State \$500. There were several counts in the declaration, in some of which the plaintiff declared on the instrument of writing sued on, as a sealed instrument, and in others as an unsealed writing. The two other co-defendants being otherwise disposed of, a verdict and judgment went

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against Hall Medlin in said count, and to reverse it he appealed to this court.

The bill of exceptions shows, that the instrument of writing sued on was given to the county of Platte for so much money borrowed from it by the defendants, of whom John Allen was principal, and Stephen Johnson and Hall Medlin, the present defendant, were securities, and that Johnson's name was erased.

James H. Johnson, the first witness, introduced by the plaintiff below, states, that by request he wrote the instrument of writing sued on, and saw said Allen and Johnson sign it, and that immediately after they went to the court-house, the court being then in session; that he was treasurer of the county; that a day or two afterwards the note was handed to him by the deputy clerk, and that about a week after he gave the clerk of the County Court a receipt for said note or writing. He further states, that his recollection is not distinct, but he thinks the name of Johnson was erased from said note at the time he received it. The deputy clerk, who handed the writing to the treasurer, thought that Johnston's name was not erased when he passed said writing to James H. Johnson, the treasurer; and the treasurer, succeeding to Johnson, stated, that he never heard of the erasure of Johnson's name till he parted with the possession, and that he did not believe it was erased before he parted with it. No order was found on the records of the County Court to authorize either the loan to Allen, on the security of Johnson and Medlin, or the erasure of the name of Stephen Johnson.

John B. Collier, a witness of the defendant, stated, that when said instrument of writing was accepted by the county court of Platte county, he was a member of that court; that when the writing was handed to the court the names of the three makers were signed and affixed thereto; that he did not recollect how long, after its reception by the court, it was until the name of Johnson was erased; that no order was made accepting said Medlin and Johnson as securities for Allen, but they were received verbally by the court.

The defendant then offered to prove, by this witness, that the said County Court, whilst in session, and in open court, agreed verbally that the name of said Johnson might be erased from said note, and that it was erased accordingly by the authority of said court, without the knowledge or consent of Medlin. This testimony was rejected by the Circuit Court, and the decision of the court was excepted to.

The evidence being closed, the Circuit Court, on the motion of the plaintiff, instructed the jury, that the erasure of the name of Johnson could not release Medlin, unless it were made by the order of the County Court, while in session. This is the substantial part of four instructions demanded by the plaintiff.

The defendant asked the four following instructions:—

1. That if the name of the said Johnson has been erased from said writing since the execution and delivery thereof, it is incumbent on the plaintiff to prove that it was done by accident or mistake, or by the consent of Medlin, and that in the absence of such proof they must find for Medlin.
2. That if the County Court of Platte county, whilst in session, gave leave to said Johnson, or to any other person, to erase the name of said Johnson from said writing, and that it was in pursuance of such leave erased therefrom, and that it was done without the consent of Hall Medlin, then the jury will find for said

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Medlin; and that it is not necessary that the order of the court, in order to be binding on the plaintiff, should have been entered on the record book of that court, and that the same may, at any subsequent term of said court, be entered, *nunc pro tunc*.

3. That if the County Court of Platte county, whilst in session, ordered Johnson's name to be erased from the note, and the erasure was made in pursuance of such order, and without Medlin's consent, then they will find for him, said Medlin, whether that order was entered of record or not, and that it is the duty of the plaintiff to show that the alteration was not made by the plaintiff, or by any of the agents of said plaintiff.

4. That if the jury believe the name of said Johnson has been erased from said note, since its execution and delivery to the plaintiff, and that it was done either by the plaintiff, or by any other person than Medlin, and without his consent, then the note as to him is void, whether the erasure was made with or without the consent of the plaintiff. These instructions were refused, and exceptions were taken to the decision of the court.

A new trial was moved for, for several reasons, which may be resolved into one—that the court refused to give the instructions.

The defendant also moved in arrest of judgment.

Even had the defendant stood on his demurrer to the declarations, (which he withdrew,) there could have been no reason to reverse the judgment for a misjoinder. Chitty, in the first volume of his pleading, says, that debt on a bond, or other specialty, may be joined in the same action with debt on simple contract.

With regard to the instructions charged to have been erroneously given by the Circuit Court, it may be observed, that, like other bodies corporate, and also like persons, it will be presumed to accept whatever is for its interest to receive, until it in some way signifies its dissent; but it will be presumed to part with none of its rights till it has expressed its will on its records: the evidence then offered, *i.e.*, the testimony of one of the judges, to prove that the several members of that court, while in session, assented to the erasure of Johnson's name, &c., was inadmissible. The judges of the County Court could express their assent to such an act on their record only; and it will then only be in season for this court to decide whether such an entry of assent can be made *nunc pro tunc*, when such an entry shall have been made by the County Court, but no such entry being now made, this court must proceed as if it had never heard any thing of the assent of the judges in open court.

The only question remaining, then, for this Court to decide, is, whether the instrument here sued on became void in consequence of the erasure of Johnson's name.

In Greenleaf on Evidence, it is said, that the early decisions establish the general proposition, that written instruments which are altered, in the legal sense of that term, are thereby made void. The grounds of this doctrine are two-fold. The first is, that of public policy, to prevent fraud, by not permitting a man to take the chance of committing a fraud, without running any risk of losing by the event when it is detected. The other is, to insure the identity of the instrument,

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and prevent the substitution of another, without the privity of the party concerned.

A distinction, however, is to be observed, between the alteration and spoliation of an instrument, as to the legal consequences. The term, alteration, is, at this day, usually applied to the act of the party entitled under the deed, or instrument, and imports some fraud or improper design on his part to change the effect. But the act of a stranger, without the participation of the party interested, is a mere spoliation or mutilation of the instrument, not changing its legal operation, so long as the original writing remains legible, and, if it be a deed, any trace of the seal remains. If, by the unlawful act of a stranger, the deed is mutilated or defaced, so that its identity is gone, the law regards the act, so far as the rights of the parties to the instrument are concerned, merely as the accidental destruction of primary evidence, compelling a resort to that which is secondary. Thus, if it be a deed, and the party would plead it, he cannot plead it with a profert, but the want of profert must be excused by an allegation that the deed, meaning its legal identity as a deed, has been accidentally, and without the fault of the party, destroyed; and whether it be a deed, or any other instrument, its original tenor must be substantially shown, and the alteration or mutilation accounted for.—See pages 600, 601.

The old doctrine, that every material alteration of a deed, even by a stranger, and without the privity of either party, avoided the deed, was strongly condemned by Story, judge, in *United States vs. Spalding*, (2 Mason, 478,) as repugnant to common sense and justice; as inflicting on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of heaven; and which ought to have the support of unbroken authority, before a court of law was bound to surrender its authority to what deserved no better name than a technical quibble.—See note to the same page of *Greenleaf*.

Under this law, as declared in the authority cited, (and there are many others cited,) the county cannot be called on to prove the erasure of Johnson's name. The County Court, the representative of the county, has entered up no order to that effect; it has made no order even commanding its agent, the treasurer, to do so; the deputy-clerk, who delivered the writing sued on to the treasury, says, he does not believe that the erasure was made when he delivered the writing to the treasurer, Johnson, and although Johnson says he believes the name was erased when he received the instrument from the deputy-clerk, yet the treasurer, who succeeded to Johnson, testifies that the name was not erased, as he believes, when the instrument of writing passed from his hands. More satisfactory evidence could not be required from a person; but in this case the plaintiff is a body corporate, speaking by its record only, and none of its agents have authority to make such an erasure; two of those agents testify that the writing passed from them undefaced.

But if those agents ever had defaced this instrument of writing, their act could have been no other than the act of a stranger, they having no authority to do the act, and no interest in the money due by the writing. The note was, then, admissible evidence, and the judgment must be affirmed.

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• BUFORD, ADMINISTRATOR, vs. BYRD.

1. The Circuit Court may, in its discretion, permit the plaintiff to withdraw his replications, and demur to the pleas of defendant, even at the term following that at which the replications are filed.
2. The seventh section of the fifth article of the act relating to "Justices' Courts," (Rev. Stat., 1835, p. 359,) allowing the obligor of a bond to impeach the consideration thereof, applies only to causes originating before a justice of the peace. In suits on bonds originating in the Circuit Court, a partial, or even total, failure of consideration cannot be pleaded in bar of the action.

APPEAL from the Circuit Court of Washington county.

SCOTT and ZEIGLER, for Appellant.

1. Did not the court err in permitting Byrd, after the issues were made up, and after the lapse of a term, to withdraw his replication, and file a demurrer to the pleas?
2. Did not the court err in sustaining the demurrer to the pleas of total failure of consideration?

P. COLE, Attorney, for Appellee.

1. The court gave judgment for the wrong party.
 2. The court erred in permitting the plaintiff to withdraw his replication, and file a demurrer.
 3. That the court sustained the plaintiff's demurrer, &c.
- And the simple point relied upon by the appellee is, that the court did what it should have done in each and every of these particulars.

TOMPKINS, Judge, delivered the opinion of the Court.

Thomas Byrd, assignee of John E. Cowan, brought an action of debt against James Buford, administrator of William Buford, on a single bill obligatory, made by the intestate in his lifetime; and Byrd having obtained a judgment in the Washington Circuit Court, Buford appeals to this Court.

Buford pleaded two pleas, which are in substance the same, to wit:—That the writing sued on was given for land; and that the vendor, Cowen, to whom the said writing had been made, and by whom it had been assigned to the plaintiff, Byrd, had no title to the land, and alleging fraud. The plaintiff replied, denying the truth of the matter pleaded, and the cause was continued. At the next term of the Circuit Court, the plaintiff asked and obtained leave to withdraw his replications to the two pleas, and then demurred to each of the pleas. The Circuit Court sustained the demurrers to those pleas, and gave judgment for the plaintiff, Byrd.

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It is contended for the appellant, Buford, that the Circuit Court committed error in permitting Byrd, after the issues were made up, and after the lapse of a term, to withdraw his replications, and file demurrers to the pleas; and also that it erred in sustaining the demurrers to the pleas of a total failure of consideration.

The plaintiff's counsel relies on this provision in the statute, to wit:—The first and second sections of the sixth article of the act to regulate the practice at law, which provide that the court in which the action is pending may amend any pleading, &c., for the furtherance of justice, provided the adverse party be allowed an opportunity, according to the course and practice of the court, to answer the pleading so amended. (Digest of 1835, p. 467.) If those pleas tendered immaterial issues, the court committed no error in permitting the appellee, Byrd, to amend his pleading, by withdrawing the replications and filing demurrers; for the defendant, appellant here, could have gained nothing by getting a verdict on such issues.

The inquiry, then, will be, whether the demurrers were rightly sustained. The counsel for the appellant contend, that the demurrers were wrongfully sustained; for, say they, "although at common law one could not inquire into the consideration of a sealed instrument, or perhaps show that it had wholly failed, yet our statute (see Revised Code, p. 359, 60, sec. 7,) has expressly subjected to this defence all actions founded on bonds or notes.

"This provision of our statute is general, and relates to all suits upon contracts before any justice of the peace or any Circuit Court, by appeal or otherwise, and gives the justice or the court the power to inquire into the consideration, or impeach the validity of the bond or note, and must have been overlooked by the court, in deciding the case of *Burrows vs. Atchison*, 7 Mo. Rep., 424."

The law referred to is the seventh section of the fifth article of the act to establish justice's courts, Digest of 1835, p. 359, and it reads thus:—"On the trial of all suits upon contracts, before justices of the peace, or in any Circuit Court, by appeal or otherwise, whether brought by the original claimant, or any person for his use, or by the payee or obligee of any bond or note, it shall be the duty of the said justice or court to hear and determine such cause on its merits, and to hear parol or other legal evidence to impeach the validity or consideration of any bond or note; and if it shall be ascertained by the justice, or court, or verdict of the jury, (if one be required,) that the consideration of such bond or note has failed in whole or in part, judgment shall be given according to the finding of the justice, or court, or verdict of the jury, notwithstanding the defendant may hold a warranty or other instrument in writing on the payee or obligee of said bond or note, purporting to be an agreement to make good the consideration of said bond or note if the same should fail."

Without going at all into the history of this provision of the law, it will suffice to say, that it is intended as an improvement on the act of 16th January, 1831, entitled, "An act supplementary to an act establishing justices' courts, and regulating proceedings in the collection of small debts." Long before the passage of this act of 1831, an act had been passed to authorize either the plaintiff or defendant, before justices of the peace, to examine each other, and the Circuit

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Courts, without any provision to that purpose, allowed the same testimony on an appeal, lest a party who had gained a suit before the justice, on the evidence of his adversary, should lose it in the Circuit Court, on appeal, through defect of that evidence. And we find in this section above recited, from the Digest of 1835, that when an appeal from the justice's court has been taken in such a case, the same kind of testimony may be given in the Circuit Court by express statutory provisions. There can be little doubt that the act was first passed to meet cases of the character of *Davis vs. Cleaveland*, 4 Mo. Rep., 206.

The counsel is quite mistaken in supposing that this Court, in deciding the case of *Burrows vs. Alter*, (7 Mo. Rep., 424,) overlooked this law. It would be quite strange, indeed, if the legislature were, in passing an act to regulate proceedings before justices of the peace, thus indirectly to make rules to govern the proceedings of the courts of record. The most careless perusal of the section relied on is sufficient to satisfy an unbiassed mind, that this law is intended to be applied to causes of action originating before a justice of the peace, and brought into the Circuit Court "by appeal or otherwise." It might come into the Circuit Court by mandamus. That court has a general superintending control over justices of the peace.—Section 8 of the 5th article of the Constitution. "But," he continues, "to limit the operation of the statute to suits commenced before a justice of the peace, would be, to make a different rule of evidence according to the court in which the suit was commenced. The justice and the Circuit Court have concurrent jurisdiction in suits on bonds or notes for the amount of \$150, (which is the amount of the note sued on,) and had Byrd sued Buford before a justice of the peace, he might have made this defence, but cannot as suit is here brought in the Circuit Court. There must be some limit to the jurisdiction of a justice of the peace, and at that limit the jurisdiction of the Circuit Court becomes exclusive. The legislature have, as I have shown, at different times, thought fit to establish a rule for the government of the justices' courts, different from the common law rules which govern the Circuit Courts; and if occasionally a case occur, like this, where the plaintiff can have an advantage over the defendant in the choice of the court in which he has commenced his suit, this court is not, therefore, to change that rule of proceeding prescribed by the law-giver. It is most plain that the legislature made this statutory provision under the impression that such defence could not be made at common law, and that relief, in such cases, could be obtained in a court of equity only. The decisions of this Court, viz., *Ewing vs. Miller*, (1 Mo. Rep., 234,) and *Montgomery vs. Tepton*, (1 Mo. Rep., 466,) are cited to show that a total failure of consideration is a good defence at law to an action on a single bill obligatory. In the first of those cases, Judge McGirk, delivering the opinion of the court, says, that Miller, the defendant, pleaded that the consideration given him was fraudulent. Without giving any authority, he then adds—"This is a plain case; fraud is pleadable at law," &c.

In the other case, Judge Pettibone states the plea to have been, "that the writing obligatory, in the declaration mentioned, was obtained from the defendant by fraud, covin, and misrepresentation;" and then adds—"The court are of opinion that this plea is good. Fraud constitutes a good defence in law, the same

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as in equity; and the general allegation of fraud, without specifying the particulars, is sufficient;" and cites, 1 Chitty's Plead., 553.

In a second plea the defendant sets out the particulars of the fraud, and shows a partial failure only of the consideration. Then the judge adds:—"This plea is clearly bad. The specification of fraud here set out does not constitute a bar to the note. The fraud is not in obtaining the note, but in misrepresenting the quality of a part of the consideration of the note: for this fraud, he must resort to his cross action."

It is evident, from this last opinion, that the court then thought that fraud in obtaining the note would have been a good plea, and therefore it was said that the general plea was good, because the particular fraud in obtaining the note might have been proved. But however decidedly the opinion of this court might have been expressed in *Ewing vs. Miller*, that a total failure of consideration would be a good plea in bar, yet it is not so apparent, from the case of *Montgomery vs. Tepton*, that they there intended to express the same opinion as in the former case. It is the opinion of this Court now, as it was in the case of *Montgomery and Tepton*, that the general plea, fraud, is good, if the proof given under such plea be confined to fraud used in obtaining the instrument of writing. Powell on Contracts, says:—"On account of the deliberation in making deeds, they are conclusive upon the party making them: consequently, if I, by deed, bond, or covenant, bind myself to give you twenty pounds to make your hall *de novo*, here you shall have an action upon this deed, bond, or covenant, and the consideration, or cause for it, is not material; for there is a sufficient consideration apparent, namely, the deliberate will of the party who made the deed." Plowden is cited. Bacon is equally positive: see 5 Ba., 155, title, "Obligations." So that, even if there be a total failure of consideration, the defendant must, at law, resort to his cross action; for the consideration cannot be inquired into at law. To the same purpose, see *Burrows et al. vs. Alter et al.*, 7 Mo. Rep., 424.

But fraud is cognizable at law as well as in equity, says the appellant's counsel, citing 10 Johnson, 461, where it is decided, that a subsequent purchaser of land, with notice of a prior unregistered deed, will, in a court of law as well as in a court of equity, be considered as informed of the prior sale. But, because a court of law will in some cases take cognizance of matters of fraud, it does not follow that it will do so in all cases. The appellant trusted to his own judgment for the goodness of the title to the land, and the obligee trusted to the solvency of the obligor. Any one may see how readily defects in titles to land, purchased some years past, can be imagined, when the day of payment falls on such days as we now have; defects which frequently would never have been thought of, if the land had been rising in value. Before a court of equity would interfere, it might require some better assurance of fraud than a string of pleas as easily spun as a spider's web.

Another authority of the appellant is, 4 Cranch, 137, where it is decided, that a court of equity will not lend its aid to carry into effect a judgment obtained in a bond where the consideration has failed. It does not appear that the appellee in this case wants the aid of a court of equity; so that authority will pass for nothing.

Baford, Administrator, vs. Byrd.—Marshall vs. Bouldin.

But it is urged that our legislature has done much to *break down* the distinction betwixt bonds and notes. Is it, then, the duty of the courts to do that which the legislature have not thought proper to do? They have the legitimate right to destroy the barrier whenever they wish to do so. For more than thirty years this argument has been urged upon the courts by men of great influence and abilities, whenever they happen to have cases requiring the abolition of that distinction; and time after time persons have been in the legislative body, where they either failed or neglected to do what this Court is urged to, and what it cannot do without usurpation of power. Amongst this class of persons, the present learned counsel is not without distinction: a member of the first legislative body in the territory, as long as he would accept the place, with an influence to do any thing useful, he did not abolish, or cause to be abolished, this distinction betwixt writings sealed and unsealed. For what reason? Because he did not think it profitable to the community. And shall this Court be requested to assume legislative power, and do what the legislature have not thought fit to do?

The pleas are bad, because the writing obligatory sued on imports a consideration in itself; the Circuit Court, therefore, committed no error in permitting the plaintiff to withdraw his replications to those pleas, and to file demurrers.

The judgment must be affirmed.

MARSHALL vs. BOULDIN.

Where a demurrer is filed to the whole declaration, and some of the counts are bad and others good, the demurrer should be sustained as to the bad counts, and overruled as to the others.—(See Rev. Stat., 1835, title, "Practice at Law," art. 3, sec. 14, 16., p. 458, 459.)

APPEAL from the Circuit Court of Howard county.

CLARK, for Appellant.

It is insisted by the appellant, that the second count of the declaration is bad, and subject to a general demurrer, and that the demurrer being to the whole declaration makes no kind of difference. If there be any one count bad, a demurrer to the whole declaration reaches it, as well as if put in specially to that count.—Digest of 1835, p. 458, 459.

BELT, for Appellee.

1. The decision of the Circuit Court cannot be inquired into by this tribunal, because, to entitle a party to the benefit of any objection to any proceedings

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in the Circuit Court, it should appear on the record: for the proceedings in a cause cannot be reviewed in the Supreme Court, unless they are preserved in a bill of exceptions.—See *Crane vs. Taylor*, 7 Mo. Dec., 285, in which all the adjudications of this Court are reviewed. There is no bill of exceptions taken in this case, and it cannot possibly appear whether the plaintiff in error excepted to the decisions of the Circuit Court. It is not sufficient that there be an *objection* to any proceeding in the court below, but there must be an exception to the opinion or decision of the court, and this exception must appear on the record, by being embodied in a bill of exceptions: *vide* decisions above referred to. And when the court below, either in the charge to the jury, or in deciding an interlocutory question, mistakes the law, the opposite party, to avail himself of the error, must tender and require the judge to seal his bill of exceptions.—3 Black. Com., 372; 7 Serg. and Rawle, 178; 1 Cowen, 622; 2 Caines, 168; 2 Cowen, 479; 5 Cowen, 243; 3 Cranch, 298; 4 Cranch, 62; 6 Cranch, 226; 17 Johns. Rep., 218; 3 Wend., 418; 9 Wend., 674.

No notice can be taken of objections or exceptions which do not appear in the bill.—8 East, 280; 3 Dall., 38, 422, note; 2 Binn., 168; Stephens' Plead., 111; 1 Bac. Ab., 527; 1 Phil. Ev., 214; 12 Vin. Ab., 262.

2. Judgment is given for the right party: for though there can be no "demurrer to a demurrer," yet on joinder in demurrer, the question arises whether the party can avail himself of the defects in previous pleadings, by filing his demurrer. In this case no advantage can be taken, because the party demurring has not *particularly specified* his causes of demurrer.—1 Chitty's Plead., 701, 702; Rev. Code, 1835, 458, 459, sec. 14 and 15.

The argument of counsel in Circuit Court, in support of the demurrer, was, that one of the counts in the declaration was defective. (2d count.)

Chitty's Plead., vol. 1, p. 703, says, "a demurrer is either to the whole or part only of the declaration. If the declaration contain several counts, and one only is bad, the defendant should demur to the insufficient count; for if he were to demur to the whole declaration, the court would give judgment against him. And this rule applies to a single count, part of which may be good and part bad: provided the matters alleged are divisible in their nature.—See decisions there referred to, and *Belton vs. Gibbon*, 7 Halstead, 76; *Whitney vs. Crosby*, 3 Caine's Rep., 89; *Backus vs. Richardson*, 5 Johns. Rep., 476; *Kingsley vs. Bill*, 9 Mass. Rep., 199, 200; *Martin et al. vs. Williams*, 13 Johns. Rep., 274; *Monell and Weller vs. Colden*, 13 Johns. Rep., 402; *Adams vs. Willoughby*, 1 Johns. Rep., 65; *Seddon vs. Senate*, 13 East's Rep., 76, 77; *Levey vs. Blacklin and Others*, 2 Mass. Rep., 541; *Harrison vs. McIntosh*, 1 Johns. Rep., 385; *Cruglee vs. Trustees of Rochester*, 12 Wend. Rep., 169; *Douglas vs. Satterlee*, 11 Johns. Rep., 16, are much stronger cases than those above mentioned. Since the statute 4 and 5 Anne, chap. 16, the provisions of which are virtually embodied in our statute, it has invariably been decided, that a party demurring can take advantage in a *general demurrer* only of defects in substance.—1 Chitty's Plead., 702, 703; 1 Saund., 337, b. 2; Wilson, 10; 5 Greenleaf's Rep., 415. Defects in form must be particularly specified and insisted upon in demurrer.—1 Chitty's Plead., 701, 702; Bac. Ab. Plead., N. S.

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Co. Lit., 72 a; Sugden vs. Croy, 2 Johns. Rep., 428. And that this is such, an inspection of the declaration (second count) will prove.

But supposing the second count insufficient on a *general demurrer*, such as the demurrer here filed; the demurrer being merely as to matter of form, even if sustained, the court under the statute, for so slight an omission, would have awarded costs to plaintiff in court below.—Rev. Code, 1835, p. 129, sec. 10.

3. The breach is properly stated.—1 Chitty's Plead., 407, 408. In debt on specialty, no inducement, or statement of consideration, is necessary in declaration.—1 Chitty's Plead., 394, 395. The derivative title of plaintiff is properly stated.—1 Chitty's Plead., 401, 402. As to statement of treaty, see more particularly 2 Chitty's Plead., 436, chap. 7, on bonds; and Evans Harris, title "Declarations in Debt."—Rev. Code, 1835, p. 458, 459.

TOMPKINS, Judge, delivered the opinion of the Court.

The declaration in this case was on a writing obligatory, and there were four counts to that declaration. The defendant demurred to the whole declaration, and the demurrer was overruled, and judgment was given on the demurrer for the plaintiff below.

To reverse the judgment of the Circuit Court, this appeal is prosecuted.

The error insisted on is, that there being four counts in the declaration, one of which was bad, the demurrer ought to have been sustained; and in support of this position reference is made to the 458th and 459th pages of the Digest of 1835, where, at page 458 of the Digest of 1835, we find, in the 14th section of the third article of the act to regulate practice at law, this provision: "When any demurrer shall be filed in any action, the court shall proceed to give judgment according as the very right of the cause and matter in law shall appear, without regarding any defect or other imperfection in any process of pleading, so as matter sufficient shall appear in the pleadings to enable the court to give judgment according to the very right of the cause, unless such defect or other imperfection be specially expressed in the demurrer;" and in the 16th section it is provided, that "Demurrers may be joint and several, and may be sustained as to part of the pleadings demurred to, and overruled as to the residue, according to the circumstances of the case, with like effect, and in all respects, as if a separate demurrer had been filed to each pleading so demurred to. The second count is charged to be defective. Admitting it to be bad, there are three good counts, and we find in the 4th section of the 7th article of the same act, that when there are several counts in a declaration, and entire damages are given, the verdict shall be good, notwithstanding one or more of such counts may be defective. The demurrer ought, if the count be bad, to have been sustained to the second count. But in this state of the case, after judgment, there being three good counts, the judgment of the Circuit Court will be affirmed.

SPRATT vs. THE STATE.

1. In an indictment for *gaming*, under the sixteenth section of the eighth article of the act concerning crimes and punishments, (Rev. Stat., 1835, p. 208,) if the offence charged be described in the words of the statute, it is sufficient.
2. An endorsement on an indictment, as follows, "A true bill," signed by the foreman, is a sufficient certifying of the indictment.
3. Evidence that the offence proved before the jury (and of which the jury found the defendant guilty) is another and different offence from that which was proved before the grand jury who found the bill, is inadmissible.

APPEAL from the Circuit Court of Platte county.

JONES, for Appellants.

Points relied on by plaintiff:—

1. That the indictment is general and uncertain. Every crime must appear on the face of the record with a scrupulous certainty.—1 Chitty's Crim. Laws, 172; 10 Petersdorf Abr., 470.

The manner of the whole fact ought to be set forth. An indictment accusing generally is bad.—1 Chitty's Crim. Laws, 229; 2 Hawkins, 25, 57, 59; 1 Salker, 198.

It is a general rule that all the circumstances which make up and constitute an act of crime should be stated.—15 Arch.; 2 East, 30; 5 East, 244; 1 Chitty's Crim. Laws, 169; 6 A. C. Laws, 11; 7 Serg. and Rawle Penn. Rep., 474, 5; 7 O. Rep., 206.

2. That the indictment does not pursue the words of the statute in describing the offence. The words of the statute must be strictly pursued in describing the offence; equivalent words will not do.—5 Mo. Rep., 358, 361; 1 Chitty's Crim. Laws, 282, 3.

3. That the indictment is not legally certified by the foreman of the grand jury. (Rev. Stat. Mo., 481, sec. 19, art. 3.) All indictments must be in words at length; no abbreviations can be admitted.—1 Chitty's Crim. Laws, 174; 2 Hale, 170, N. G.

4. That the evidence offered and rejected by the court ought to have been admitted.—1 Chitty's Crim. Laws, 162-8, 212; 3 *Ibid.*, 949; 4 Bla. Com., 102, 302.

TOMPKINS, Judge, delivered the opinion of the Court.

Jeremiah H. Spratt was indicted under the 16th section of the 8th article of the act concerning crimes and punishments, and being found guilty, he now seeks to reverse the judgment of the Circuit Court.

It is objected—

1. That the indictment is uncertain.

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2. That it does not pursue the words of the statute in describing the offence.
3. That it is not legally certified.
4. That the evidence offered and rejected by the court ought to have been received.

The indictment charges that Spratt did bet a large sum of money, to wit, the sum of twenty-five cents upon a game of chance, played by means of a pack of playing cards, which said pack of playing cards was, &c., a gambling device, adapted, devised, and designed for playing a game of chance for money and property. The 16th section of the above act provides, "That every person who shall bet any money or property, &c., at or upon any gaming table, bank or device, prohibited by the preceding section," &c. The preceding section, to wit, the 15th section, after enumerating several species of gaming tables or gambling devices, adds, "Or any kind of gambling table or gambling device, adapted, devised, and designated for the purpose of playing any game of chance for money or property," &c. These are the gaming tables, banks, or devices referred to by the 16th section, and prohibited by the 15th.

In the case of *The State vs. Mitchell*, (6 Mo. Rep., 147,) it was decided, that if the offence, in the indictment charged, be described in the words of the statute, it is good. To the same purpose, see cases there referred to. The indictment in this cause describes the offence in the words of the statute.

The third objection to the indictment is, that it is not legally certified by the foreman of the grand jury. The act requires the foreman of the grand jury to certify under his hand that the indictment is a true bill.

On the record, we find this entry.

"On the back of which indictment we find the following endorsement, to wit: 'The State vs. Jeremiah H. Spratt:—a true bill:' subscribed by the foreman. This endorsement is very well made."

The fourth point is, that the court rejected evidence. The bill of exceptions shows, "that the plaintiff offered to prove to the jury, by competent evidence, that the offence given in evidence by the circuit attorney, before the jury, on the trial of this cause, and for which the jury found a verdict of guilty against the defendant, was another and different offence from that which was proved before the grand jury "who found the bill against the defendant." This evidence was rejected by the court, and exceptions taken.

It might very well happen that the defendant was guilty of betting many times within the time limited by law for prosecuting such offences, and that any one of these offences might have been proved before the jury under this indictment, for the only certainty required by the statute is as to time and place. And if the bill be found within the time, and after the commission of the offence, limited by law, and the offence be charged to have been committed within the county, it is enough. So that, if the defendant had been frequently guilty of betting the sum of twenty-five cents, as charged, he might have been found guilty under this indictment of any one of such offences; and it ought to be imputed to his good fortune that he escaped indictment of the remaining part. No grand juror can be allowed to come into court to say that evidence given before the body of which he was one, went to

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establish the fact of the betting on one day of the month rather than on another, or at one place in the county rather than at another; for these things are immaterial, unless it be to discredit a witness. The seventh section of the third article of the act to regulate practice and proceedings in criminal cases, directs the deliberations of grand juries to be private; and the seventeenth section of the same article provides, that "No grand juror shall disclose any evidence given before the grand jury, except when lawfully required to testify as a witness in relation thereto," &c. It is the second time that I ever knew a member of the bar pretend to be informed of the evidence given before the grand jury before it was disclosed in the manner prescribed by law, and this does not here appear to have been disclosed in such manner.

The judgment of the Circuit Court will be affirmed.

THE STATE vs. PEPPER ET AL.

Where it appeared, from the record, that two forfeitures of a recognizance were entered at different terms of the same court, it was held that the last entry might be treated as mere surplusage.

APPEAL from Washington Circuit Court.

P. COLE, for Appellees.

The point in this case is this:—Were the two defaults legally entered against defendants at the July and November terms of the Circuit Court?

TOMPKINS, Judge, delivered the opinion of the Court.

This is a proceeding by *scire facias* against John Pepper, James Pepper and William Pepper. The writ states, that on the 17th day of February, James Pepper and William Pepper entered into a recognizance conditioned that John Pepper should personally appear before the Circuit Court of Washington county on the first day of the term thereof, to be held at the Court-house on the second Monday in July then next, to answer, &c.; and that he failed to appear at the time and place aforesaid, although called, &c. It is further stated, that said John Pepper was again called, on his said recognizance, at the November term of the said court, and failing to appear, the said court adjudged that his recognizance should be forfeited, as it had before decided at the July term, then next preceding, and that they were summoned to show cause why the said sum of five hundred dollars ought not to be levied, &c.

The State vs. Pepper et al.—Benoist & Hackney vs. Inhabitants of Carondelet.

The point made for the defendants by Mr. Cole, their attorney, is this: "Were there two defaults legally entered against the defendants at the July and November terms of said court?"

If the *scire facias* had been issued immediately after the first failure, more justice would have been done to the State, but it is not perceived that the defendants have any right to complain of the neglect of the officer to issue his writ at an earlier day, inasmuch it is not seen that five hundred dollars is claimed to be paid for each forfeiture. The second forfeiture is a mere surplusage not in any manner injuring the defendant.

The judgment of the Circuit Court must, therefore, be affirmed.

BENOIST & HACKNEY vs. INHABITANTS OF CARONDELET.

An instrument of writing, executed on behalf of a corporation, and to which the seal of the corporation is affixed, must be declared on as a bond or sealed instrument, although, in the body of the instrument, it is stated to be a *note*, having the corporate *seal* affixed thereto.

ERROR to the Court of Common Pleas of St. Louis county.

DARBY, for Plaintiff in Error.

The cause assigned as special cause of demurrer, on the part of the defendant, is, that the instrument sued upon and set out in the petition was a writing under seal, and was declared upon and described as a note.

The instrument, as we have before shown, on its face describes it as a note; it reads as a note; and the chairman so executed it. The seal of the corporation being set upon the same paper on which the note was written, could not make it a bond; and this, too, without the authority of the chairman who executed the note. The seal being attached to the same paper by the register, could not make it a bond when there was nothing in the instrument itself which imported that it was to be a bond.

The seal being attached is only an evidence that it was the act of the corporation, nothing more; and the mere act of the seal being so attached, could not make it a bond, any more than a seal being attached to an ordinance or resolution of the board of trustees could make the latter a bond. The seal was the evidence of the act of the corporation: the note was complete without it; and, according to the reasoning of the defendant, a corporation could not make a note, because the seal being attached would, of itself, without any reference to it in the instrument itself, make it a bond.

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The point is so simple, that I do not know that it is necessary to refer to any authorities; nor do I know any that I could refer to, save Chitty on Bills, p. 332, for the definition of a promissory note.

BOGY and HUNTON, for Defendant in Error.

According to all rules of pleading, it is clearly erroneous to sue upon a bond or sealed instrument, as an unsealed instrument; and the petition herein shows the writing to be a bond.

The principle is recognized and settled in the case of *Brown vs. Lockhart*, 1 Mo. Rep., 409.

TOMPKINS, Judge, delivered the opinion of the Court.

Louis A. Benoist and Aaron H. Hackney commenced an action by petition in debt against the inhabitants of the town of Carondelet, and state that they are the legal owners of a note against the inhabitants of the town of Carondelet, to the following effect:—

“Carondelet, February 16th, 1841.

“Twelve months after date, the inhabitants of the town of Carondelet promise to pay to Wilson Primm, or order, the sum of two hundred dollars, for value received, negotiable and payable without defalcation, with interest from the date till paid. In witness whereof, the chairman of the board of trustees of the said town of Carondelet has signed this note, and the register of the said town has countersigned the same, and has affixed hereunto the corporate seal of the said town of Carondelet.

(Signed) “JOSEPH LEBLOND, Chairman.

“Teste,”

“P. L. McLAUGHLIN, Register.” [Seal.]

This writing was endorsed by Primm to Benoist & Hackney. The declaration, or petition, was demurred to, and the cause assigned for demurrer was, that the instrument of writing sued on and set forth in the petition is a writing under seal, and it is described and declared on as a note or unsealed instrument.

The seal put to an instrument of writing which is delivered, makes the difference between a deed which implies a consideration, and a parol agreement in writing, or, in other words, a note.—See *Powell on Contracts*, 200.

The inhabitants of the town of Carondelet, in this case, act by two agents, the chairman and register. To the register seems to belong the keeping of the corporate seal. In private writings there are, in such cases, but two persons in each party, obligor and obligee, and the instrument itself, from the solemn manner in which it is executed, i. e., by affixing the seal of the obligor, implies a consideration which cannot be inquired into at law. There is still more solemnity in the manner of executing the instrument of writing here under consideration, than in the execution of a private single bill obligatory. Here are two officers, the one to be a check on the other; the chairman signs the writing, but before it becomes a valid instrument of writing, the register signs and affixes the corporate seal. Then the instrument, on delivery, becomes the deed of the inhabitants of Caron-

Benoist & Hackney vs. Inhabitants of Carondelet.—Morris vs. Lenox and Martin.

delet. But it is contended, that by this course of argument, every ordinance of the town becomes a deed. It is an abuse of language to call a law a deed. The law or ordinance is an act of as high solemnity as a deed, and it is as obligatory on those for whose government it is made, as is the writing obligatory on the individuals who execute such writing obligatory.

The writing sued on, then, being stated to be a note, and the writing set out in the petition being a bond or writing under seal, the demurrer to the petition or declaration in debt was, in the opinion of this Court, properly sustained in the Court of Common Pleas.—See *Brown vs. Lockhart*, 1 Mo. Rep., 409.

The judgment is, therefore, affirmed.

MORRIS vs. LENOX AND MARTIN.

Plaintiff sued defendant before a justice of the peace on the following account:

"For one horse colt, valued at.....\$30

Damages in loss of said colt.....\$35—\$85."

The Circuit Court subsequently granted a prohibition, on the ground that the justice had exceeded his jurisdiction, the claim not being founded in contract, and the justice not having jurisdiction in actions in tort for the amount claimed. *Held*: That the justice had jurisdiction, and that, therefore, the writ of prohibition was improvidently issued.

ERROR to Crawford Circuit Court.

W. V. N. BAY, for Plaintiff in Error.

1. The subject-matter was within the jurisdiction of the justice.—Rev. Code, 348.

2. A writ of prohibition will not be allowed where the subject-matter is within the jurisdiction of the subordinate tribunal; if error intervenes, the remedy is by appeal.—*Vide The People*, on the relation of David Keen, vs. S. S. Seward, 7 Wend. Rep., 518; 3 Black. Com., 113, 114, n. 29.

3. The defendant might have availed himself of his defence upon the trial in the court below, but having failed to do so, is without remedy.

4. The Circuit Court erred in granting the prohibition, and should have set the same aside on motion of the plaintiff.

5. Prohibition will not lie where the inferior court has only jurisdiction over part of the matter and not of the rest.—2 Hanson's Dig., 1273; 2 T. Rep., 473.

FRISSELL, for Defendants.

It is conceded, that if the justice had jurisdiction, the writ of prohibition was improvidently issued.

Morris vs. Lenox and Martin.

It is clear that Morris could not sue Lenox in either debt or assumpsit, for the want of an express or implied assumpsit. The action must be in *tort*.

The statute (acts of 1835, p. 348, sec. 5) expressly denies to justices jurisdiction in the actions of detinue and replevin.

The same statute (sec. 3) gives to justices jurisdiction in actions of trespass, and trespass on the case, wherein damages claimed do not exceed fifty dollars.

A writ of prohibition in this case is the appropriate remedy; for it lies from a superior to an inferior court, where the inferior tribunal exceeds its jurisdiction.—2 Chitty's General Practice, 355, 360.

TOMPKINS, J., delivered the opinion of the Court.

Evan Morris commenced a suit before a justice of the peace of Crawford county against Wilson Lenox and Samuel Martin, and filed the account following against them:—

"For one horse colt, valued at.....\$50 00

Damages in loss of said colt35 00—\$85 00."

Judgment was given for Morris, and Lenox and Martin took an appeal to the Circuit Court.

An act of 12th February, 1839, required any person, aggrieved by any judgment rendered by a justice of the peace, before taking an appeal, to make an affidavit before the justice, that he does not take such appeal for the purpose of vexation and delay; but because he considers himself aggrieved by the judgment of the justice. This appeal was taken on the 4th January, 1840. The affidavit was not made as required by law, and when the cause came into the Circuit Court it was dismissed, on the motion of the plaintiff, made on the second day of March next ensuing. It being then too late to take another appeal in due form before the justice, Lenox and Martin applied to the Circuit Court for a writ of prohibition to restrain the justice from any further proceeding in the cause; and a writ was accordingly issued, and Morris appealed, the prohibition being made perpetual.

A writ of prohibition issues from a superior to an inferior court to restrain the latter from exceeding its jurisdiction. (5 Bacon, 446, title, "Prohibition.") The justice clearly had jurisdiction here, and the writ was improvidently issued.

Every man, when he is engaged in a suit, is supposed to know the law. We can't proceed in a law-suit on any other principle. This law, requiring an affidavit to be filed before an appeal is taken, was passed on the 12th day of March, 1839, and the appeal, in this cause, was taken on the 4th of January next ensuing.

The defendants had time enough to inform themselves of that act, and although it may be a hardship, yet it is one that proceeds from their own negligence, and cannot now be relieved.

The judgment of the Circuit Court, making the writ of prohibition perpetual, must be reversed. The cause will be remanded to the Circuit Court, which court will remand it to the justice of the peace, to be proceeded in according to this opinion.

Lenox vs. Grant.

LENOX vs. GRANT.

G. brought an action on the case against L., a justice of the peace, for maliciously, &c., issuing his warrant against G., and causing him to be arrested, &c., as a vagrant. *Held*: That the action would not lie; that a justice of the peace, acting within the sphere of his office, is not liable to an action for an error of judgment, EVEN IF HE ACT CORRUPTLY, but must be indicted.

APPEAL from Crawford Circuit Court.

FRISSELL, for Appellant.

For reversing the judgment, the appellant relies upon the error committed in bringing the suit. The form of the action is case, but should have been trespass. — *Morgan vs. Hughes*, 2 Durnford and East, 226, is in point, and a leading case.

2. That Lenox was a judicial officer, acting in a judicial capacity, and within his jurisdiction, and therefore not liable to an action. — *Yates vs. Lansing*, 5 Johns., 292; *Ibid.*, S. C., 9 Johns., 295.

TOMPKINS, J., delivered the opinion of the Court.

John Grant brought an action of trespass on the case against Wilson Lenox, charging that he, the said Wilson Lenox, a justice of the peace, &c., without any reasonable or probable cause whatever against the said John Grant, but wrongfully and unjustly contriving and intending to imprison, harass and injure him, the said John Grant, falsely, wickedly and maliciously, did issue a certain warrant at the suit of the State against him, the said John Grant, directed to the constable, &c., by which said warrant he, the said Lenox, commanded the said constable to take the said John Grant, and bring him forthwith before him, the said Lenox, &c.; that he, said Grant, was arrested on said warrant, and imprisoned for the space of twenty-four hours, &c. Lenox, the defendant, pleaded —

1. A special plea, that he acted as justice of the peace in the discharge of what he believed to be his duty, &c.

2. He put in the general issue.

The special plea was demurred to, and the demurrer sustained. A trial was had on the other plea, and judgment was given to the plaintiff, and his damages assessed to one hundred dollars. To reverse this judgment, the defendant, Lenox, appeals to this Court. The sixteenth section of the sixth article of the act concerning crimes and punishments provides "That every person holding or exercising any office of public trust, who shall be guilty of wilful and malicious oppression, partiality, misconduct, or abuse of authority in his official capacity, or under color of his office, shall, on conviction, be punished by imprisonment in the

Lenox vs. Grant.—Randolph vs. The State.

county jail for a term not exceeding one year, and fine not exceeding one thousand dollars."

The demurrer to the plea ought to have been overruled. But the declaration is bad, showing on its face, in both counts, that the appellant, Lenox, was acting judicially when he issued the warrant, and the defendant might have well demurred to it. 5 Bacon, title, "Offices," p. 212, letter N., says:—"That all officers, whether such by common law or made pursuant to statute, are punishable for corruption and oppressive proceedings, according to the nature and heinousness of the offence, either by indictment, attachment, action at the suit of the party injured, loss of their offices," &c. "But," he adds, "besides the punishment by indictment, information, &c., all courts of record have a discretionary power over their own officers, and are to see that no abuses are committed by them which may bring disgrace on the courts themselves." It is only indirectly that a justice of the peace can injure a man whom he causes to be brought before him on a charge of vagrancy, and whether the justice in issuing the warrant was mistaken, or acted maliciously, and without probable cause, cannot certainly be known to any but the great searcher of hearts; the jury that finds him guilty must, unless he confess, necessarily act on dubious evidence. It is not so with ministerial officers, as constables and sheriffs; their acts are sometimes oppressive, whilst in the case of judicial officers it is the erroneous judgment that produces or causes the oppression; and if this error of judgment be merely the mistake of an honest mind, then the justice is innocent in the eye of the law, but if the error be wilful and corrupt, then let him be indicted as the law above cited provides. But in an action for damages, sustained by reason of an error of judgment, he cannot be liable.

The case of *Stone vs. Graves*, decided at this term, is to the same purpose, that a justice of the peace, acting within the sphere of his office, is not liable to an action for an error of judgment, even if he act corruptly, but must be indicted.

RANDOLPH vs. THE STATE.

Upon examination of the record in this cause, the Court were unable to find any error therein.

ERROR to Circuit Court of Clay county.

REID, for Plaintiff in Error.

POINTS AND AUTHORITIES.

1. That the Circuit Court of Clay county erred in taking and entertaining jurisdiction of the said cause, because the same was not properly certified to said Clay Circuit Court from the Circuit Court of Clinton county, as required by law

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upon a change of venue.—Digest of 1835, p. 787; *Ibid.*, p. 614; 3 Mo. Rep., 147, Jim, a slave, vs. State; 5 Mo. Rep., 538, Porter vs. State.

2. That the Clay Circuit Court erred in overruling the demurrer of the plaintiff in error to the *scire facias* in said cause.

KIRTLEY, for Plaintiff in Error.

The only question growing out of the record in this cause is, the sufficiency of the *scire facias* and the question on the demurrer, which it is insisted was improperly decided in the Circuit Court.

DUNN, Circuit Attorney, for The State.

1. That there having been no objection taken to the jurisdiction of the Circuit Court, in that court, the want of jurisdiction cannot be assigned for error.

2. The court committed no error in ruling the demurrer of the defendants to the *scire facias*, and giving judgment for the State.

TOMPKINS, Judge, delivered the opinion of the Court.

This is a proceeding by *scire facias*. The record shows, that Cyrus Hubbard, a justice of the peace of Clinton county, on the 11th December, 1840, filed in the office of the clerk of the Circuit Court of that county, the recognizance of Daniel H. Hubbard and others, conditioned that they should appear in the Circuit Court of said county on the first day of the term thereof then next, &c. They failing to appear, according to the condition, their recognizance was forfeited. The entry is thus, in substance: "It is ordered that the recognizance be forfeited, and that a *scire facias* issue, &c."

It is further stated on the record, that the parties appeared at the return term of the writ of *scire facias*, and demurred to the writ, and that the judge of the court having been of counsel in the cause, it is ordered that the venue thereof be changed to the county of Clay, and then the clerk of the court makes the usual certificate, that the transcript of the record is full and perfect.

In the Circuit Court of Clay county the demurrer was overruled, and judgment entered up for the State; to reverse which this writ of error is prosecuted.

It is insisted by Mr. Kirtley, for the plaintiff, that—

1. The judgment is for the wrong party.
2. The Circuit Court erred in taking jurisdiction of the cause.
3. The Circuit Court erred in overruling the defendant's demurrer.

The counsel not having pointed out any particular error, nor shown any reason why his demurrer should be sustained, I have read over the record, and found none. On examination of the statute laws, I find it provided, that "When any indictment or criminal prosecution shall be pending in any Circuit Court, and the judge is in anywise interested, or shall have been counsel in the cause, such cause may be removed by order of the court to some county in another circuit.—

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Section 15 of the 5th article of the act to regulate practice in criminal proceedings, p. 486 of the Digest of 1835.

The cause, then, was one which the law authorized to be removed, and no clerical error having been pointed out or perceived, the judgment of the Circuit Court must be affirmed.

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1. If a judgment is void, advantage may be taken of it in any collateral proceeding; but if the court has jurisdiction over the subject-matter, and the party defendant has notice of the proceedings against him, he is bound thereby, however irregular or erroneous the proceedings, and the judgment is binding and conclusive on all parties and privies thereto, in any collateral proceeding, unless it has been vacated for irregularity or reversed for error; and rights and titles acquired by virtue of an execution issued on such judgment will be protected.
2. Although it may not appear from the proceedings in a cause that process has been served on a party, yet if he appear by attorney and file a plea, &c., he will be considered as having personal notice. The object of a summons is to procure the attendance of a party, and so that is effected, it matters not whether the summons is served or not.
3. A mortgagee may become the purchaser of the equity of redemption directly from the mortgagor, or may purchase the property under a decree of foreclosure and sale.
The mortgagee has never been considered within the rule which forbids trustees and those having a fiduciary, or confidential, character from purchasing estates with whose disposition they have been entrusted.
4. The rule in chancery, that under the prayer for general relief a party may have any relief to which he is entitled, is to be understood, that the relief granted is to be founded on the facts stated in the bill, and not such as may be proved at the hearing.

APPEAL from St. Louis Court of Common Pleas.

LAWLESS and NABB, for *Appellants*, submit the following general points:—

1. The decree of foreclosure, and all the proceedings under it, are void, being *coram non judice*.
2. After the execution, and before the foreclosure of the mortgage dated 22d March, 1819, no arrangement or agreement touching the equity of redemption, in any way impairing or affecting the right of redemption in the mortgagors, A. W. McNair and M. S. McNair, is valid; for, until the relation of mortgagor and mortgagee be dissolved, which must appear from the showing of the mortgagee by the most undoubted and satisfactory evidence, in equity the parties are incapable of any contract as to the redemption, from the policy of the law.
3. Where the statute prescribes a mode of foreclosing mortgages, it is against the policy of the law and equity for any sale to be made by any arrangement of

the parties, but the same must be in pursuance of the strict requisitions of the statute.

4. Admitting, quoad A. McNair, the sale to be effectual, as made to divest title out of him, M. S. McNair, being a femme covert in 1805, co-mortgagor and co-obligor in 1819, after the seizin of her husband, and party defendant in 1823, and widow in 1826, her right of redemption survives to him, she not having consented or being privy to any arrangement.

5. The certificate of acknowledgment in the deed of 22d March, 1819, conveying the two by forty arpens near St. Louis, is not sufficient to divest her of her estate in the premises.

6. The sale of 4th October, 1824, was made under circumstances of fraud.

SPALDING, for Appellees.

POINTS AND AUTHORITIES FOR APPELLEES.

I. The foreclosure, and sale therein, to John Mullanphy, of the two by forty arpents, passed the legal title to him.

1. The decree was sufficient to support the sale, so far as regards Alexander McNair.—1 Edwards' Compilation, 182; *Ibid.*, 847, sec. 26, 36; Geyer's Digest, 308, act relating to mortgages; *Ibid.*, 242, 3, &c., acts regulating judicial proceedings, &c.; Acts of Assembly of November, 1821, p. 76; an act regulating proceedings at law; 1 Mo. Rep., 240, that proceeding is on common law side.

2. And there is no irregularity as to him, making the sale void.—10 Pet. Rep., 472, *Voorhees vs. Bank*; 4 Dana Rep., 429; 8 Cow. Rep., 361, *Cunningham vs. Gallatin*; (this case cited by Nabb to show invalidity of decree: it does not show or sustain any doctrine to that effect.)

3. The decree is also valid against the wife.—10 Peters' Rep., 472; *Storey's Equity Pleading*, 72, sec. 71, and p. 670, sec. 873—that appearance of wife must be by next friend, if she does not join her husband's answer; 5 Cow. Dig., 572; 2 Tidd's Practice, 1056—appearance of infant by attorney is error.

The decree is entitled in the case of *Mullanphy vs. A. McNair and Margaret S. McNair*, saying that the parties came, &c.

4. Complainants cannot question the passing of the title, as their own bill alleges it, and goes upon the supposition that both the mortgage and the sheriff's deed operated.—9 Pet. Rep., 405; 2 Miss. Rep., 210.

5. Even supposing the decree not binding upon the widow, it cannot affect the title, as she had no dower; *first*, because she released it in joining with her husband in the mortgage; and, *second*, because the statutes then in force allowed her no dower.—1 Edwards' Compilation, 178, 418; Geyer's Digest, 175; 13 Johns. Rep., 109, 111; 4 Leigh's Rep., 498; 1 Edwards' Compilation, 129, 399, 509; Acts of Territorial Legislature of session of 1814, p. 118, sec. 9, and p. 157, sec. 72; *Ibid.* of 1816, 17, p. 47, 48, 49, secs. 1-4.

The acts show that there was no dower in land conveyed away by husband in his life-time, or, if there was, that it was divested by the sale and foreclosure.

6. A public sale of land at auction, by order of court in an execution, is not, of

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course, void because of a private understanding between the debtor and creditor.—1 Sugden on Vendors, 131, 323, 324, 333; 3 Mad. Rep., 232.

Nabb cites 1 Sugden, 333, which relates to sales of reversions only.

II. There is no equity to induce the court to divest the legal title.

1. There is no equity arising from the circumstances of the sale.

2. Nor in the fact, that it was tied in with an understanding with McNair, that Mullanphy should allow him a larger sum than it would bring at sheriff's sale.

3. Nor in the agreement itself, which is given in evidence for the purpose of rebutting the alleged equity, and showing that McNair was not wronged, and not because it is necessary to prove any agreement binding in law.

4. But the agreement was binding according to law, and would not have been affected by the statute of frauds.—1 Sugden on Vendors, 133-5; 2 Miss. Rep., 126, 135.

5. Had there been no agreement or understanding, the property would not have brought \$6,000 at the sheriff's sale.—See O'Fallon's testimony; the conclusion of Dent's deposition; Jesse G. Lindell's testimony, &c.

6. There was no plan to defraud on the part of Mullanphy.

7. Nor was there any oppression.

8. There is nothing in the relation of mortgagor to mortgagee to prevent the sale of the equity of redemption to the latter by the former.—2 Sugden on Vendors, 127; 2 Sch. and Lefroy, 672; 3 Powell on Mort., 1154 (a); 1 Powell, 122, 127 (a).

9. The contract, if we are bound to defend it as a contract, was not rescinded, because Mullanphy did not formally give the credit.

III. The lapse of time is a sufficient reason why the court will not interfere.—Revised Code, 470, sec. 5; 2 Sch. and Lefroy, 671, 672; 1 Sumner's Rep., 115, 116; 4 Dana's Rep., 429; 1 Caine's Cases in Error, p. 17.

IV. Mrs. McNair has no right to redeem, in consequence of the proviso in the mortgage; because if she had a right of dower, then the right of redemption in mortgage is only a recognition of that right. If she had no right of dower, then her right to redeem is without consideration, and therefore continued only till the money fell due.

Mrs. McNair has no right in the property on the grounds of the Spanish law, as there was no community; for the community had been repealed.—See the several acts of the legislative authority, giving dower to the wife, which is in lieu of her interest under the Spanish law, in what is called the community.

A husband and wife, marrying in Spain, where the laws provide a community of interest, a *partnership*, between husband and wife, and then removing here, to Missouri, do not bring with them the law of Spain; but if they acquire lands, the wife's interest will be governed by the law of Missouri; and in all such cases, the wife's interest in lands acquired depends entirely on the law of the country to which they remove, and where they acquired land.—Storey's Conflict of Laws.

Exactly on the same principles, Mrs. McNair obtained only such interest in land as the law gave her, which was in existence at the time of the acquisition of the land.

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Furthermore, the bill does not set out her title by *community*.

V. If McNair and his heirs are barred by the sale, and Mrs. McNair only has a right to redeem, then there are too many complainants, and there can be no decree for complainants.—Calvert on Parties, 77, which is in 15 Law Lib., 46; Storey's Equity Pleadings, 199.

SCOTT, Judge, delivered the opinion of the Court.

This was a bill in chancery, filed by the heirs of Alexander McNair, deceased, and Margaret S. McNair, widow and administratrix of said Alexander McNair, against Ann Biddle and others; in which it was alleged, that Alexander McNair departed this life on the 18th of March, 1826, leaving the said widow and heirs; that he was seized, during his life-time, of considerable real estate in the county and city of St. Louis, and in the counties of St. Charles, Washington, Jefferson, and others, in the State of Missouri:

That McNair, becoming indebted to J. Mullanphy, deceased, formerly of St. Louis, in the sum of \$4,000, together with his wife, mortgaged to said Mullanphy, to secure the said sum, a lot of ground, two arpens in front and forty deep, being the same conveyed to McNair by Pierre Chouteau, by deed bearing date 13th September, 1808, and which is the subject of this controversy. The mortgage was executed on the 22d March, 1819, and was to become absolute in one year, unless the mortgage debt was paid. During the years 1820 and 1821, McNair, to secure the payment of other debts to Mullanphy, amounting to \$10,251, bearing ten per cent interest, mortgaged all the other real estate which he possessed. On one of these mortgage debts suit was brought and judgment obtained, and the equity of redemption of all the property included in the mortgages last mentioned was sold under execution on the 6th of October, 1824, and Mullanphy became the purchaser, with the exception of one lot in St. Louis. Mullanphy, by threats and efforts to intimidate, obtained the said property at a great sacrifice. A petition to foreclose the equity of redemption in the two by forty arpent tract, described in the first mortgage, and the subject of this suit, was filed by Mullanphy, and judgment was obtained against McNair, and the property ordered to be sold on the 4th of October, 1824. The tract was sold, and Mullanphy became the purchaser for \$1000, receiving a deed for the same, dated 18th of October, 1824. The bill then alleges, that the said tract of land, at the time of sale, was worth \$20,000, the house thereon had cost \$5,800, and there were other improvements of great value. It is then charged, that Mullanphy succeeded in obtaining said lot by direct misrepresentation and delusive promises, practised upon and made to said McNair and his wife. At the sale, Mullanphy prevented all competition, by giving it to be understood that the subsequent mortgages above mentioned were incumbrances on the two by forty arpent tract; that he was, in fact, the purchaser for the benefit and as the friend of McNair and family, and did impress on the minds of the said McNair and wife, that he would hold the said tract for their benefit, and either would re-convey it, or allow for it a large credit. Such was the confidence reposed by McNair in Mullanphy, and so assured was

he of Mullanphy's friendship, that he, in the month of —, 1823, long previous to said sale, surrendered possession of the tract of land on which McNair then resided to Mullanphy, who placed thereon Ann Biddle and her husband, Thomas Biddle. The balance of the debt secured by the said mortgage on the lot remains unpaid, amounting to upwards of \$7,000. Mullanphy, in 1829, conveyed the said land to William Clarke for life, with remainder in fee to Bryan Mullanphy, in trust to the sole use of Ann Biddle. Ann Biddle has been in possession of the lot since 1823. Mullanphy died 18th September, 1833, having previously appointed John O'Fallon his executor, who has taken upon himself the burden of administering the same.

The bill prays for an account, and to be let in to redeem, and that the sheriff's deed may be ordered to be delivered up to be cancelled. The judge of the Circuit Court being a party to the suit, it was sent to the Court of Common Pleas for trial.

Ann Biddle, in her answer, stated, that she knew nothing of the indebtedness of McNair to her father, save that she had heard her father say, that he was afraid he had loaned more money to McNair than he could be able to recover, and more than all his property was worth. She had no knowledge of the title of Mullanphy to the lot whose redemption is sought by the complainant's bill, until the same was filed; nor did she know that the same had ever been mortgaged, more than that she had an impression the lot had been acquired by her father from McNair, on account of his failure to repay money loaned to him. She admits, the lot was mortgaged by McNair and wife about the time mentioned in the bill, and the same was duly foreclosed, and a decree of foreclosure was entered July 2d, 1824, on which an execution issued for \$6,111 11, under which a sale was made of the lot to Mullanphy, for which he received a deed from the sheriff:

That Mullanphy did not purchase said lot for the benefit of McNair and his family. She believes an arrangement was made between Mullanphy and McNair, whereby Mullanphy was to have the lot, and accordingly Mullanphy bought in with the approbation of McNair, and the said lot was Mullanphy's, not only by the sale aforesaid, but with the knowledge and consent of McNair. She denies any improper influence was exerted by Mullanphy, or misrepresentations made by him, by which competition at the sale was prevented, or the sale in any way affected to the prejudice of McNair. Nor were any representations made by Mullanphy, which induced McNair or his friends to believe that Mullanphy was purchasing the lot for McNair's benefit; nor was there ever the least encouragement held out to McNair or his wife that the lot was purchased for their benefit; but on the contrary, it was purchased with a full knowledge on the part of McNair that it was for the benefit of Mullanphy, and without the least expectation in McNair of a right to redemption. She knows of no agreement between Mullanphy and McNair as to allowing a credit for the same, and if there was such an understanding, it must have been that such a credit should be allowed at a settlement, which has never taken place to her knowledge.

Since the sale, no attempt has been made to collect the balance of the debt secured by mortgage on the lot in dispute. The lot was not worth more, at the

time of sale, than the mortgage debt, which was between six and seven thousand dollars. It is true, that McNair, some time in November, 1823, did surrender to Mullanphy the lot, and thereupon he put her and her husband in possession of the same, which had been promised to her by her father; that McNair gave up the possession to her father under an agreement to purchase, and did not put him in possession as mortgagee; and had it even been so, yet the rents and profits, between the delivery of possession and the sale under the decree of foreclosure, amounted to an inconsiderable sum.

That McNair was fully aware of the purpose for which possession was given to her and her husband, and that it was fair and just, and without the least hope of redemption; that her father, some time in 1824, conveyed the lot in trust for her sole and separate use, as she had then recently married; and that afterwards, it being desirable to modify the trust for the benefit of her husband, Thomas Biddle, the deed of trust, which had never been recorded, was suppressed, and another, modifying the former, was executed in October, 1829, as stated in the bill. She denies the right of redemption, and insists on the length of time, as throwing a cloud on the justice of the demand.

The answer of O'Fallon sustains that of Mrs. Biddle, and states some additional facts, which will be noticed. He heard, about the time of the sale, both Mullanphy and McNair, according to his best recollection, say, that it was agreed between them that Mullanphy should take the lot at \$6,000, or thereabouts, and in pursuance of this arrangement, McNair removed from the property on which he had resided, and gave up the same to Mullanphy, who placed thereon Ann Biddle and her husband.

That the lot, with all its improvements, at the time of sale, was not worth more than \$6,000, if so much, and he doubts if a person could be found who would have given that price for it; that Mullanphy never kept any books, so far as he knows or believes, in which his transactions were entered, except a little memorandum book, in which nothing is found in relation to his dealings with McNair.

That the agreement above stated having been made, he is willing to cancel the bond for the debt secured by the mortgage. He believes McNair was never credited by Mullanphy for the rent of the lot from the time possession was taken by Thomas Biddle till the sale, because said possession was delivered by McNair in compliance with the agreement between McNair and Mullanphy, above mentioned, which he believes was carried into effect by the sheriff's sale and deed, under the decree of foreclosure. He considers the balance of the mortgage debt satisfied. He is positive he heard McNair say, that, by an agreement between him and Mullanphy, the said lot was to have been the property of Mullanphy for \$6,000, or thereabouts.

The answer of Bryan Mullanphy is a formal one.

Replications were filed, and the cause set for hearing. On the hearing, the mortgage on the lot in dispute, and the proceedings thereon to foreclose the same, were given in evidence; also, the sheriff's deed, and all the other mortgages and records referred to in the pleadings in the cause. It was proved, that McNair

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and his wife were married in 1805. Frederick Dent, a witness, considered the lot worth \$10,000. In 1816 or '17, it might have been worth three times that amount. On the morning of the day on which the sale of the lot took place, he met McNair at the court-house. McNair was in a great rage with Mullanphy, and said if he came there he would whip him; he dissuaded McNair from such a course of conduct; advised him to have an interview with Mullanphy. Just about that time Mullanphy came up, and he and McNair retiring, had some conversation; after which, McNair returned to the witness, expressed his gratitude for his advice, and observed, that Mullanphy intended to do him justice; he understood McNair to say, Mullanphy was to give him \$4,000 above what was bid for the lot. In a conversation some weeks afterwards with McNair, he was informed by him that he had misapprehended him, that he was to have \$6,000 for the property, and that he surrendered possession on those terms. The lot was worth \$450 rent in 1823. He thought the arrangement McNair made with Mullanphy a very good one.

Robert Rankin testified, he was not present at the sale of the lot; that property had greatly depreciated in value at the time of the sale.

Beriah Cleland was present at the sale of the lot in dispute. Robert Rankin was present, and bid for the property. Witness inquired of Mullanphy, just before the lot was knocked down at \$1,000, whether McNair would thus suffer his property to be sacrificed. Mullanphy answered, he did not believe McNair's friends would bid, as there was an understanding between McNair and himself. This conversation was in so low a tone of voice as nobody but Mullanphy could hear it.

The complainants gave in evidence, a letter from McNair to Major Biddle, of which the following is a copy:—

“*St. Louis, 13th October, 1823.*”

“*Major Biddle:—*

“Dear sir,—You have made a proposition to me, as authorized by Mr. Mullanphy, to take the property I live on, *which exceed to*, the possession of which I would like to retain for one month.

“Your friend,

“A. McNAIR.”

“MAJOR BIDDLE, *Present.*”

Much other evidence was introduced about the value of the lot, and the cost of the improvements thereon. The improvements were supposed to have cost \$6,000. The property was estimated variously, at from \$6,000 to \$20,000; McNair himself thought it worth \$15,000. A great deal of evidence was given in relation to the unprecedented depreciation of the value of all property in the years 1822, '3 '4 '5. In 1816, '17, '18, and '19 there had been great speculation in real estate. Property of all kinds afterwards fell very much in price, and great distress prevailed in the community, which was greatly aggravated in St. Louis in consequence of the failure of the Bank of Missouri.

A decree was entered, dismissing the bill, from which the complainants have appealed to this Court.

It was urged by the complainants, that the judgment or decree of foreclosure

under which the lot was sold was void, and consequently, no title passed to Mullanphy by virtue of the sheriff's deed. It must be conceded, that no title passes under, or by virtue of, an execution issued on a void judgment; and if a judgment is void, advantage can be taken of it in any collateral proceeding; but it is equally clear, that if a court of record has jurisdiction of the subject-matter, and the party defendant has notice of the proceedings against him, he is bound by them, however irregular or erroneous they may be; and until direct proceedings are had on the judgment itself, to vacate it for irregularity, or to reverse it for error, it is binding and conclusive on all parties and privies thereto, in any collateral proceeding; and rights and titles acquired by virtue of an execution issued on such judgment will be protected by all courts.

This is a principle of our jurisprudence which has been steadily maintained, from a deep conviction of the mischiefs which would ensue from the least relaxation of it. If, after a court of competent jurisdiction has pronounced its judgment against a party who has notice of the proceeding, he were permitted, on another action, to call the justice or propriety of that judgment in question, there would be no end to litigation, and a law-suit would be interminable; and if it were a principle, that the title acquired at judicial sales would be valid only in the event that the judgment or decree on which process issued, by virtue of which the sale was made, was such that it could not be vacated for irregularity, or reversed for error, prudent men would be driven from such sales, a purchase at every such auction would be hazardous speculation, property would be sacrificed, and courts of justice brought into odium and disrepute, as the authors of a legalized system of gambling with the property of their suitors. The case of *Voorhees vs. The Bank of the United States*, (10 Peters, 472,) is an instance of the great length to which this principle has been carried by the Supreme Court of the United States.

Property was sold under the foreign attachment laws of the State of Ohio, and the court held the title to the purchaser passed by the sale, although it appeared the creditors were not to sell until twelve months, and it did not appear when the sale was made. In the case of *Jackson vs. Bartlett*, (8 Johns. Rep.,) the court held, the question of the regularity of the execution could not be raised in a collateral proceeding; though an execution may have issued after a year and a day from the rendition of a judgment, without revival by *scire facias*, it was only voidable at the instance of the party against whom it issued. A purchaser's title under such an execution was not to be questioned: it was a good authority for the sale. So, in the case of *Parker's Heirs vs. Anderson's Heirs*, (5 Monroe, 452,) it was held, that if a judgment or decree was reversed, the purchase of the plaintiff would not be affected more than that of a stranger.

The case of *Gallatin vs. Cunningham*, (8 Cowen, 361,) although it contains a remark of a single member of the court favoring the views of the complainants, yet the sale was, in that case, declared void and set aside, because a guardian had purchased the estate of his ward without the permission of the court.

Is there anything in the proceedings to foreclose the equity of redemption of the lot in dispute, which would induce a court to hold the judgment void? so far as *A. McNair* is concerned, it is doubted whether the judgment could be reversed

for error. There is no pretence that the court had not jurisdiction of the subject matter; and although it does not appear that process was served on McNair, yet he appeared by his attorneys and entered his plea, on which issue was taken, which was submitted to the court for trial, and found against him. The object of a summons is to procure the attendance of a party, and so that is effected it matters not whether it is served or not. As to the objection that there was no answer filed, and this was a proceeding in chancery, it may be answered that this Court, in the case of *Carr vs. Holbrook*, 1 Mo. Rep., 240, held that proceedings to foreclose the equity of redemption, in a mortgage under the statute, are proceedings at common law, and not governed by rules in chancery. In speaking of the validity of these proceedings, so far as they affected McNair, we do not wish to be understood as expressing any opinion as to their force and effect against Mrs. McNair. For the present, we confine ourselves to the case in the bill made by the heirs and representatives of McNair. If, then, the court had jurisdiction of the subject-matter, and if McNair had notice of the proceedings against him, which is apparent from the record, then it will follow, from the principle above stated, that a title to the lot passed by the sheriff's sale and deed to Mullanphy. If, then, the title passed, it will next be necessary to inquire whether there is any thing stated in the bill or proved at the hearing, or if the relation of mortgagor and mortgagee is of a character that will induce a court of equity to permit the parties to redeem? Is there anything in the relation of mortgagor and mortgagee which prohibits the purchase of the equity of redemption by the mortgagee? The mortgagee has never been considered within the rule which forbids trustees and those having a fiduciary or confidential character from purchasing estates with whose disposal they have been entrusted; nor is a contract between mortgagor and mortgagee, for the purchase of the equity of redemption, within the principle which restrains dealings between guardian and ward, attorney and client, heirs selling their expectancies, sailors disposing of their wages, all which transactions are *prima facie* fraudulent, and those who claim under them must establish their correctness and exemption from all fraud and imposition. Sugden says, the rule which prohibits a trustee from purchasing the trust estate has never been applied to a purchase by a mortgagee from the mortgagor, and it was to be hoped it never would be. He continues—in Ireland, many leases granted by mortgagors to mortgagees were set aside by Lord Redesdale, on the ground that the transaction was usurious, although that learned judge's successors have not been inclined to carry the principle as far as he did. It will be observed, that Lord Redesdale, who held this doctrine, expressly declared that it did not impeach the dealing between mortgagor and mortgagee for a sale of the equity of redemption. Sugden says, that a sale by a mortgagor to a mortgagee stands on the same principle as a sale between parties having no connexion with each other, and can only be impeached on the ground of fraud. The mere circumstance that the mortgagee purchased for less than another, would not of itself be a sufficient ground to impeach the sale.—2 Sugden, 111, 112.

Were there any circumstances attending this sale which will induce a court of equity to set it aside? The charge in the bill is, "that Mullanphy succeeded in

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obtaining the sale to himself for said nominal price, by direct misrepresentations and delusive promises, practised upon and made to said Alexander McNair and his wife Margaret." Is there any evidence to maintain this allegation, which is a material one, and must be supported to obtain the relief sought by the bill? Admitting the correctness of the statement of Cleland, though he must be mistaken as to the time at which he heard the declaration of Mullanphy, that there was an arrangement between him and McNair as to the property, does that show that there were any misrepresentations made, or delusive promises held out, by Mullanphy? Even if there was an arrangement, that does not appear to have been so notorious as to have affected the bidding. The conversation between Cleland and Mullanphy relative to the agreement was in so low a tone of voice as could not have been overheard by others. There is not the least evidence that the arrangement between McNair and Mullanphy in any way whatever induced persons not to bid for the property. The letter of Major Biddle, introduced as evidence by the complainants, shows that McNair acceded to the terms proposed by Mullanphy, and gave up possession in pursuance of them. What that arrangement was we are not left to conjecture. The evidence clearly shows that it was, that Mullanphy should have the mortgage property for the mortgage debt. Although, if this were a bill for a specific performance of the agreement referred to in the letter of McNair to Biddle, the statute of frauds would forbid a resort to parole evidence to supply the omissions of the letter, or to show what the agreement was, yet as it is not set up as matter on which relief is sought, as it is not attempted to enforce it against McNair, but is used merely as evidence to repel a charge of fraud and misconduct on the part of Mullanphy, we are at a loss to conceive on what grounds the objections to it are based. The opinions of the witnesses were different as to the value of the property; yet if consideration is had of the unparalleled pecuniary distress which then universally prevailed in the country, heightened in St. Louis by the failure of the Bank of Missouri, and of the evidence of the friend and adviser of McNair, Fred. Dent, we cannot but adopt his conclusion, that the arrangement was a good one on the part of McNair; Dent is not alone in this opinion—he is sustained by witnesses of intelligence, whose experience (judging from the manner in which they testified) enabled them to form correct views on this subject. Nor is it a circumstance of little weight, that McNair himself expressed great satisfaction at the arrangement. Does the evidence, taking the depositions of the witnesses and the answer of Mrs. Biddle, show that any representation was made by Mullanphy to McNair, or that there was any promise held out which has not been beneficially realized by him? We say beneficially, for the only failure on the part of Mullanphy to comply with his arrangement was an omission to cancel or deliver up the bond for the mortgage debt—an omission which has not been attended with the least inconvenience to McNair or his representatives, and which it does not appear, from anything in the cause, had its origin in any improper motive on the part of Mullanphy.

It is said that the agreement between Mullanphy and McNair was such an one as could not have been enforced in equity on a bill for a specific performance. This may be conceded, but it would seem that the time to make that objection would

come when a specific performance of the contract is sought in equity by the defendants. They hold the land by a deed conveying the legal title, and no aid is sought by them in a court of equity. The agreement is set up in support of a legal title, and to disprove that it was obtained under such circumstances as will let in the complainants to redeem, and to repel the charge that there was any misrepresentation made, or imposition practised by Mullanphy. Under the circumstances of this case, there is little or no weight in the fact, that the bond for the payment of the mortgage debt was never surrendered nor cancelled. The agreement between Mullanphy and McNair was made about the commencement of the suit to foreclose the equity of redemption, and it is probable that it was agreed that it should be consummated in that way. The concern expressed by McNair on the day of the sale, lest he should be deceived, and the expression of his satisfaction at the assurances made by Mullanphy, that the agreement made by them should be adhered to, confirm the impression that the suit was regarded as the mode by which the arrangement should be effected. This will account for their inattention to the bond, and the length of time that has since elapsed, affording a double bar by the statutes of limitations. The fact that no use has been made or attempted with it, the willingness to deliver it up, show that the parties regarded the sheriff's deed as the act which finally consummated their agreement.

After a careful examination of this case, we are satisfied with the opinion, that there was no misconduct on the part of Mullanphy, much less such as would induce a court of equity to set aside the sale made by the sheriff, under the judgment of foreclosure.

As to the question whether Mrs. McNair is entitled to redeem as dowress, or partner of the marriage community, we do not consider that it arises on the bill. It is impossible for one to read this bill, and from its contents say, that he is informed that Mrs. McNair claims as dowress, or partner of the marriage community. Nothing is clearer than that the allegations and proof must correspond; and the rule, that under the prayer for general relief, a party may have any relief to which he is entitled, is to be understood, that the relief granted is to be founded on the facts stated in the bill, and not such as may be proved at the hearing. Chancellor Kent says, with respect to this point, "I apprehend the rule to be, that though the bill contains, as usual, a prayer for general relief, and also a prayer for specific relief, that the plaintiff may have other specific relief, provided it be consistent with the case made by the bill." (*Wilkin vs. Wilkin*, 1 Johns. Chan. Rep., 111.) To permit Mrs. McNair to redeem as partner of the community, would defeat the object of pleadings, which is to apprise a party of that against which he is to prepare a defence. The counsel of Mrs. McNair contends, that she was jointly seized with A. McNair, as partner of the community, in the lot in dispute, and is therefore entitled to redeem. This is an assumption at variance with the fact stated in the bill, that McNair, during his life, was seized in fee. But if Mrs. McNair had joined in the bill, as partner of the community with the heirs, then the heirs claiming a right to redeem on one ground, and she on one entirely different, the bill would have been multifarious, and a demurrer to it would have been sustained on that ground. A demurrer for multifariousness, as

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it now stands, could not have been sustained, because that objection does not appear on the face of the bill, but the complainant would have the fruits of such an irregularity by withholding the facts from the bill, and giving them in evidence at the hearing, a mode of procedure which, if tolerated, would subvert the established forms of proceeding in courts of equity. That a bill framed according to the relief sought by Mrs. McNair would be multifarious, the cases of *Devoue vs. Fanning*, 4 Johns. Chan. Rep., 204; *Dunn vs. Same*, 2 Simms, 32; *Maud vs. Acklom*, *Ibid.*, 331; *Salvidge vs. Hyde*, Eng. Com. Chan. Rep., 68; *Attorney-General vs. St. Johns' College*, 10 Eng. Com. Chan. Rep., 38, show. Conceiving that Mrs. McNair's right to redeem is not properly before the court, we give no opinion as to the validity of the proceedings against her, on the petition to foreclose the mortgage, nor as to her right to redeem as partner of the community, or as dowress; but will reverse the decree of the court below, and decree that as to all the complainants, except Margaret S. McNair, the bill be dismissed, and as to her, that it be dismissed without prejudice to another suit, and that the complainants pay all costs.

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1. Where there is any evidence tending to the proof of a fact, its sufficiency to establish that fact must be determined by the jury; therefore, in such a case, it is erroneous in the court to instruct the jury that the evidence is not *sufficient* to prove the controverted fact.
2. Though the holder of a bill of exchange, payable at any number of days after date, is not bound to present the bill for acceptance, but may wait until it becomes due, and then present it for payment, yet if he does present the bill for acceptance, and acceptance is refused, he must give notice to those parties to whom he means to resort for payment, or they will be discharged from all liability.
3. An endorser is entitled to notice of the dishonor of a bill, although the drawer may have had no effects in the hands of the drawee.
4. Evidence that a bill was transmitted to a party "soon" after protest for non-acceptance, and that, on receiving the bill, he *immediately* gave notice to an endorser, is not due notice to the latter.

APPEAL from the St. Louis Court of Common Pleas.

GAMBLE and BATES, for Appellants.

For the appellants, it is insisted—

1. That though the holder of a bill of exchange, payable at any number of days after date, is under no obligation to present the bill for acceptance, but may wait and present it for payment when it becomes due, yet if he does present it for acceptance, and acceptance is refused, he is under the same obligation to give notice of

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the dishonor of the bill as if it had been payable after sight, and a failure to give such notice discharges the endorser.—Chitty on Bills, 197; Byles on Bills; 1 Peters' Rep., 25; see the point at page 35.

2. That though a promise to pay a bill after its dishonor will dispense with the proof of notice, yet it must be a real positive promise, or a clear acknowledgment of the debt, as a present subsisting obligation.—Chitty on Bills, 233, 239.

There was here no such promise or acknowledgment.

3. That the want of effects in the hands of drawee is no excuse for not giving notice to an endorser.—Chitty, 228.

Thus far the points are upon the failure to give notice of the non-acceptance of the bill.

On the question of notice of non-payment, the appellants make the following points:—

1st: That notice, being necessary to charge an endorser, is to be proved by the plaintiff, and is to be proved to have been given within the time allowed by law.—Chitty, 314.

2d: That the notice is to be shown to have been sent by the mail next after the protest, or if the party undertakes to give the notice in any other than the usual and authorized mode, the burden is on him to show that it was received as soon as it would have been by mail. (Chitty, 315.) If the parties reside in the same town, the notice must be left at the place of business of the party notified.—10 Johns. Rep, 490; 11 *Ibid.*, 231.

3d: Smith & Carter, not being parties to the bill, had nothing to do with giving notice to those who were parties, so that any time could be allowed them for that purpose. A person who is a party, and receives notice of the dishonor of a bill, is allowed to give notice the next day to the previous parties, but there is no such time allowed to a stranger.—Chitty, 226, 227.

For any thing that appears in the evidence, Glasgow & Harrison might have received the notice by the same mail which brought notices to Smith & Carter, and were not notified as early as they might have been, because the notices came to Smith & Carter.

The court below ought, then, to have non-suited the plaintiff on the motion of the defendants, and after failing to do that, ought to have granted a new trial.

WILLIAMS, *for Appellee.*

POINTS FOR DEFENDANT.

1. Was it necessary to show that notice of protest for non-payment was mailed at Philadelphia, and when?

I contend, that it is not essential that notice be mailed. It may be sent by messenger, or in any way, provided it reach the party to be charged as speedily.—Story on Bills, 452; Bayley on Bills, 276; Rahm vs. Bank of Philadelphia, 1 Rawle, 335; Bancroft vs. Hall, Holt, 476.

If it had been mailed at Philadelphia, then it should and would necessarily have appeared at what time, an inquiry that does not here spring up.

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The question, material in this case, is, when did notice reach the endorser, and was that notice within reasonable time?

The holder lived in Philadelphia; the endorser at St. Louis. The proof shows that it required ten days for mail-passage between the two cities; and Carter proves that he put notice to the endorser into the post-office on the tenth or eleventh day, at farthest. Was this within reasonable time?

It is not essential that notice be mailed, if mailed at all, on the same day of protest, although the post may have left on the same day. The next post is in time, if it shall be three days after protest.—Bayley on Bills, 262, 265; Chitty and Story; Wright vs. Shawcross, Barn. and A., 501; Hawkes vs. Salter, 4 Bing., 715.

It follows, then, that notice on the eleventh, twelfth, or even the thirteenth day after protest at Philadelphia, would have fixed the endorser at St. Louis. Notice was put into the post-office at St. Louis, by Carter, on the tenth or eleventh day.

2d: Should Carter have served *personal* notice on endorser, instead of sending through the post-office?

The rule of law is, that when a party to be charged resides in the same place with the holder, personal service of notice is necessary, but it is otherwise when he lives out of the same town or city.—Story on Bills, 452, sec. 328; Bayley on Bills, 277.

The most that can be said is, that reasonable diligence should be used in all cases to make the notice effectual, and it should appear that notice is received by the endorser, or, from the evidence, it should be fairly inferred by the jury that notice was received. This is sufficient to charge the endorser.—Story on Bills, 333; United States vs. Carneal, 2 Peters, 549; Bank of the United States vs. Corcoran, 2 Peters, 121.

TOMPKINS, Judge, delivered the opinion of the Court.

Peter Copeland, suing for the use of George Milne, brought this suit against James Glasgow and James Harrison, as the endorser of a bill of exchange.

The declaration states the bill to have been drawn on the first day of March, 1842, payable six months after date, by one James Smith, on Craig, Bellas & Co., of Philadelphia. There were four endorser, of whom the defendant were the second. Judgment was given for the plaintiff, and, to reverse it, Glasgow & Harrison prosecute this appeal.

The testimony of the plaintiff shows that the bill was protested for non-payment on the third day of September next after the date; and the witness states, that on the fourteenth day of September, or on the previous day, the firm of Smith & Carter, of which the witness was one, received notices of the protest for non-payment for the various parties on the bill, in particular, a notice for the firm of Glasgow & Harrison.

It appears also on the record, that this bill was, on the 19th day of April, 1842, protested for non-acceptance, and in reference to this protest the same witness

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says—"That the bill was transmitted to the said firm of Smith & Carter,¹ soon after its protest for non-acceptance; that immediately after its receipt, he waited upon Glasgow & Harrison at their place of business in St. Louis, and intimated that the acceptance of said bill had been refused, and exhibited the bill and its protest to them; that he had subsequent interviews with them, particularly with James Glasgow; that Glasgow stated, that effects which formed the consideration of the bill had been sent to the drawees at Philadelphia, and that if the bill was again presented to them for acceptance, it would be honored; that on this information, the bill was again sent to Philadelphia, and acceptance again refused." The record then states, that "*this being all the evidence,*" "the defendants, by their counsel, prayed the court to instruct the jury that the plaintiffs had given no evidence *sufficient to hold the defendants liable.*" The sufficiency of evidence properly belongs to the jury to decide on. If any evidence had been given on which the jury could find for the plaintiff, this instruction could not, with propriety, be given. A new trial was also moved for on the common-place reasons. It was not necessary to present this bill for acceptance. (See Chitty on Bills, 8th edition, p. 299.) If, however, a bill be in fact, though unnecessarily, presented, and acceptance refused, &c., notice should be immediately given to the persons to whom the holder means to resort for payment, or they will, generally, be totally discharged from their respective liabilities. (Chitty on Bills, 354; 1 Peters, 35.) The defendant, appellant here, is entitled to notice as endorser, although the drawer may have had no effects in the hands of the drawee.—Chitty on Bills, 357.

It was proved in this cause that the usual time for the mail to pass from Philadelphia to St. Louis is ten days, and the notice should have been put into the mail on the next day after protest.—Chitty, 367.

But the witness says the bill was transmitted to Smith & Carter, of St. Louis, (of which firm he was one,) *soon* after its protest for non-acceptance, and that he, immediately after its receipt, informed Glasgow & Harrison of the protest. It is proper here to remark, that the meaning of the word "*soon*" is relative. The day of trouble soon comes, if it come even in a week, a month, or, indeed, if it ever come; an inattentive and idle man might suppose he gave notice *soon* after the protest, if he did it in a week even. So that, if we even grant that the witness gave the notice to Glasgow & Harrison on the same day, (as he seems to intimate by using the word *immediately*,) yet still it cannot be called due notice of the protest for non-acceptance. The plaintiff may then be said to have given no notice of the refusal to accept, or of the protest for non-acceptance; and the Court of Common Pleas ought then to have told the jury that no proof had been given to make the endorsers liable.

The counsel for the appellee seems to be sensible that this is most obviously the vulnerable point in his case, and to labor hard (as if with a view to conceal the weakest point) to prove that notice of protest for non-payment was duly given. He contends, that it is not absolutely necessary to send the notice by mail. He says, and says truly, "that when a party lives in the same place with the holder, personal service of the notice, or notice left at the house, is necessary; (10 Johnson, 490; 11 *Ibid.*, 231;) but it is otherwise when he lives out of the same town

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or city: then he may either send it by mail or by a special agent. He chose to use both mail and special agent, and this special agent lived in the same city, and, in this respect, personated the appellee himself; and it became the appellee, if he had been in St. Louis, to leave this notice either at the residence or at the place of doing business of Glasgow & Harrison. It was not unaptly observed, that had this letter been directed to Glasgow & Harrison, from Philadelphia, they would have received it as soon as the witness did. But suppose they present themselves at the post-office on the day of the arrival of the eastern mail, and find no letter there, then they come not again till the arrival of the next mail, and lose the time betwixt the two arrivals; the effect is the same as if the plaintiff, appellee, had delayed putting the letter in the mail until the second day after the protest, with this aggravation, that although the appellee, by his attorney in fact, was present in the city of St. Louis, yet that attorney chose to throw the letter into the post-office, and expose the appellant to that risk of losing the notice which none but a non-resident can legally require him to incur. But it is useless to say any thing about the want of notice of non-payment, for, by failing to give notice of the protest for non-acceptance, the appellants are exonerated.

The judgment of the Circuit Court must be reversed.

SHEPARD vs. CITIZENS' INSURANCE COMPANY.

1. A new trial will not be granted on the ground of surprise in the testimony of a witness of the opposite party in relation to a particular fact, when the party must have been aware that the witness would have been called for the purpose of proving that fact, as where a notary public is called by the plaintiff to prove due notice of the dishonor of a bill of exchange.
2. Proof that the notary made inquiry of several of his acquaintances in different parts of the city of St. Louis, as to the place of business or residence of the maker of a bill, without being able to ascertain either, was held to dispense with proof of notice.

APPEAL from the Court of Common Pleas of St. Louis County.

HUDSON and HOLMES, for Appellant.

POINTS AND AUTHORITIES.

1. A new trial will be granted on affidavit of a surprise in the evidence, when the testimony could not reasonably have been anticipated, and when it is material to the issue.—Graham on New Trials, 168, 172, 184; 11 Price, 383; a case cited in 2 Harris' Dig., 1524; as to the time of giving notice, see Chitty on Bills, 506, note 12; Man. Rep., 172, 403; 1 Peters, 84, cited; Chitty on Bills, 513, 515, and notes.

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2. The truth of the matter contained in an affidavit must be taken for granted; and if sufficient matter be sworn to, to constitute good ground for a new trial, it is enough.

The particularity insisted upon by the court below is nowhere expressly required. No case cited in *Graham on New Trials* speaks of such a requisite. "The surprise must arise out of facts which are, in their nature, calculated to produce that effect."—*Graham*, N. S., 178. The principal fact stated in the affidavit is the false swearing, which, if material, must occasion a surprise. The defendant relied upon this same witness to prove the facts as they were, as he best knew them.

3. The endorser is bound to show that reasonable inquiries have been made, and due diligence used, to ascertain whether the maker has a place of residence, or a place of business, in town or not; whether he is at home, or absent; whether he has removed, and whither; whether he is dead, or out of the jurisdiction of the State; whether there is an administrator, &c., before a personal presentment will be excused.—*Story on Bills of Exchange*, sec. 350, 351, 352, and notes; the case of *McGruder vs. the Bank of Washington*, 9 Wheat., 599 to 622, cited. A demand on the maker is, in general, indispensable; and that demand must be made "at his place of abode, or his place of business." It is incumbent on the endorser to show due diligence in ascertaining the fact of a removal. "Had the house been shut up, he might, with equal correctness, have returned, 'that he had not found him;' and yet that clearly would not have excused the demand, unless followed by reasonable inquiries."—*Chitty on Bills*, 400, 401. If the place of residence or business be shut up, "the holder must endeavor to find out to what place he has removed." In this case the notary neither went to the maker's house, nor to his place of business, nor looked in the directory for either, nor inquired of any other party to the note, although the defendant resided in the very heart of the city, as he was bound to do.—See *Story on Bills*, sec. 305, and the notes within a few sections after.

The inquiry of the notary, of two or three strangers that he casually met on a public street, was not sufficient diligence, within the meaning of these authorities.—*Chitty on Bills*, note to p. 506, cite *Binney*, 541, and 6 Mass., 386.

GEYER and DAYTON, for Appellee.

POINTS AND AUTHORITIES.

That the evidence, as preserved by the record, if true, is perfectly conclusive in favor of the verdict and judgment that was rendered upon it, and that the only question now requiring to be considered in the case is—

Did the court err in refusing to grant a new trial upon the reason first assigned, and the affidavit filed in support thereof?

In the first place, the affidavit is utterly defective in not alleging, either expressly, or by implication, that the appellant had any good or meritorious defence to the action.—*Vide Meechum vs. Indy*, 4 Mo. Rep., 361 *Elliott vs. Leak*, 4 Mo. Rep., 540.

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The affidavit is also defective, in not specifying what matters stated by the witness in his said evidence are false, so that the court can judge whether they are material.—Graham's Practice, 511; 4 Johns., 425; 1 Hall, 382; 1 Caine's Rep., 24.

The affidavit shows no sufficient excuse for not being prepared at the first trial, with the testimony which, it states, could be produced, should a new trial be granted.

It must have been known to the appellant, before the trial, that Garnier was the notary who protested the note and gave the notice; that he must necessarily be called to give testimony to those facts; and the record shows that his testimony was confined strictly to those matters. If it were in the power of the appellant to prove, independent of the testimony of the notary, that any of the facts necessary to a recovery did not exist, he ought to have come prepared for that purpose. From all that appears in the affidavit, the appellant knew the facts of his case and what he could prove, as well before as he did after the trial. He ought to have prepared himself accordingly.—*Vide* 5 Wendell's Rep., 127; 3 Caine's Rep., 182; 2 Caine's Rep., 155; 18 Johns. Rep., 489; 7 Mass. Rep., 205; 15 Mass., 378.

But if the affidavit had alleged merits, been sufficiently specific in relation to the pretended false statements, and shown due diligence on the part of the appellant, still the court would not grant a new trial without the affidavits of others than the party interested, as to what could be proved by way of contradicting the testimony of the notary, or without its being shown to the court that such affidavits could not be procured.

In a motion for a new trial, on the ground of newly-discovered evidence, the applicant must procure the affidavits of those who are to be the witnesses, setting forth what they can testify to, or he must show that such affidavits cannot be obtained.—*Vide* Hall's Rep., 382; 4 Johns. Rep., 425; 3 Caine's Rep., 182.

There is no difference between such a case and this, which justifies the application to the latter of a rule less strict. The presumption is, that if the appellant can prove on a new trial what he alleges in his affidavit, he might have obtained the affidavits of the witnesses by whom he is to prove it. Having failed to do this, the testimony of an unimpeachable and disinterested witness ought to be taken as true, in preference to vague and general statements, supported only by the oath of the party interested. There would be no end to new trials, if one could be obtained on such an affidavit.—Graham on New Trials, pp. 177, 229 to 235, and 496 *et seq.*

TOMPKINS, Judge, delivered the opinion of the Court.

The Citizens' Insurance Company brought their action against Elihu H. Shepard in the Court of Common Pleas of St. Louis county, and judgment being there given for the company, Shepard appeals to this Court.

It is stated in the declaration, that one Samuel Brooks, on the twenty-first day of April, in the year 1842, made his promissory note, and thereby promised to pay to the order of said Shepard, for value received, sixty days after the date

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thereof, one hundred and seventy dollars, negotiable, &c., and delivered it to the defendant, Shepard, who endorsed and delivered it to the plaintiffs. The note not being paid when due, this action was brought against Shepard as endorser.

The bill of exceptions shows, that after the note and protest for non-payment were read in evidence, the notary public was called, who, being examined in chief, stated on the part of the plaintiff, that, on the day the note was protested, he was not able to find the maker, and that, next morning, as he believed, he left a notice of the protest at the dwelling-house of the defendant, with the wife or daughter of the defendant, the defendant himself being absent. On his cross-examination, he said that he might be mistaken about having delivered the notice at the defendant's house, as he had stated in his direct examination, and his attention now being called to the matter more particularly, he thought he was mistaken, and that he delivered the notice to the defendant the next day after the protest, in person, a little before dark, in front of the defendant's house.

On this testimony the defendant moved the court to instruct the jury that there was no evidence before them on which they could find a verdict for the plaintiff. This motion being overruled, the jury found a verdict for the plaintiff, and the defendant moved for a new trial — First, because he was surprised by the evidence of Joseph V. Garnier, the notary public, the witness upon whose evidence the said verdict was found; second, because the said verdict was against law, evidence, the weight of evidence, &c.; third, because of a variance betwixt the proof and the declaration; because no sufficient evidence of notice of dishonor.

The defendant then made an affidavit, in which he stated that he was taken by surprise on the trial of the above cause, in this, that the said Joseph V. Garnier, a witness on behalf of the plaintiff, in his evidence, stated certain matters which were entirely false, and that he verily believes that in consequence of the false testimony of said Garnier a verdict was rendered against him, and that had the said Garnier testified to the truth, and nothing but the truth, that the verdict and judgment would have been in favor of the said defendant; that he did not anticipate what Garnier would state on the trial; that he verily believes that he will be able to show that the evidence of the said Garnier, given on the trial of the said cause, was, in several material points, false and untrue, should a new trial be granted.

A more slight pretence for a new trial was, perhaps, seldom or ever made. He knew from the declaration what the plaintiff would attempt to prove, and he must, if he had reflected a moment, have known that this proof would be, most probably, attempted to be made by the testimony of this said Joseph V. Garnier, the notary public; and he must also have known whether he had been informed of the protest for non-payment, and that the plaintiffs would not be so simple as to bring suit, unless they expected to be able to make out their case. Why, then, did not this defendant come prepared with evidence to rebut that of the notary public, or to impeach his general character as a man of veracity? If, as is contended, we are bound to presume the facts stated in the affidavit to be true, we are equally bound to take notice that none but the grossly negligent man would have omitted to provide testimony to meet such a case.

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The endorser is indeed bound, as is contended, to show that reasonable diligence has been used to ascertain whether the maker had a place of residence, or a place of business, in town. It seems to me evident enough that he made out a very good *prima facie* proof that the maker had no such place, either of residence or of business.

The notary stated, that in endeavoring to present the note, he went some distance up Main-street, and a little way down said street, and inquired of several of his acquaintances; whom he met, as to the place of residence or business of the maker; but none of them knew any thing about either his place of residence or business, or about the maker.

In such a place as St. Louis, if a notary public knew nothing of the place of residence or place of business of any man, it would raise a reasonable presumption that such man had no place of business or place of residence in the city, other than a place of lodging in a boarding-house; and if a notary public, in walking over a square or two along Main-street, could find no acquaintances that knew of such man, then, it appears to me, the presumption would be, that the man had neither place of residence nor place of business in St. Louis. That the notary inquired of two or three strangers "*that he casually met on the public street,*" is a gratuitous assertion. The evidence on the record does not warrant such an assertion. The failure of Shepard, the appellant, to prove, or to attempt to prove, that the maker of the note had either a residence or a place of business in St. Louis, is strong evidence of the correctness of the notary's conclusion, that the maker was a non-resident of St. Louis. The affidavit of surprise, made by the appellant, in order to obtain a new trial, is no other than such a one as any man, who is indisposed to pay his debts, would readily make; and the most negligent, as well as the most diligent might, safely make it, unless rebuked by conscience.

The judgment of the Court of Common Pleas ought, in my opinion, to be affirmed.

HOFFSTETTER vs. BLATTNER.

1. Where a person in possession of premises sells the same and removes from the house, and delivers the keys of the house to his vendee, with the intention of giving him possession, such acts will amount to a delivery of possession, and will enable the vendee to maintain an action of forcible entry and detainer against an intruder.
2. One tenant in common of land may cast his co-tenant and hold adversely to him.

ERROR to the Court of Common Pleas of St. Louis county.

GAMBLE, for Plaintiff in Error.

The plaintiff in error makes the following points:—

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1. That the court erred in admitting the testimony of Moser, who testified that he possessed the property under a written lease from Blattner, when the lease was not produced, nor its absence accounted for. He testified also that he had sold to Blattner, and no conveyance was shown.

2. That the plaintiff was not entitled to recover on the case made, and the court ought to have given the instruction asked.

3. That the court erred in refusing to admit the evidence offered by defendant, Hoffstetter. Strasser was Hoffstetter's lessor, and if he and Blattner were tenants in common, the possession of neither is adverse to the other, without proof of actual ouster.

4. That the court erred in giving the instructions which were given.

5. That the court erred in refusing the new trial moved for by Hoffstetter.

6. That the judgment is beyond the penalty of the appeal bond.

PRIMM, TAYLOR, and GEYER, for Defendant,

In support of the judgment, the defendant in error submits the following:—

This Court will not look into the record, and reverse the judgment of the lower court, because—

1. The plaintiff in error did not except to the judgment of said court, in overruling his said motion for a new trial, for by quietly looking on without excepting, he admitted the correctness of all that preceded said verdict, as well as the judgment overruling that motion.—*Swearingen vs. Newman's Administrator*, 4 Mo. Rep., 456.

2. An appellate court will only consider such matters and decision as appear on the record to have been excepted to by the party complaining; hence this Court will confine its investigations to the overruling of the motion of the plaintiff in error to *non-suit* the defendant in error, because the same is the only judgment of the court below excepted to.

3. This Court will not undertake to say the court below erred in overruling the motion for a new trial, because it does not appear, from the bill of exceptions in this cause, that all the evidence introduced before the jury is preserved in the same.—4 Mo. Rep., 18; 5 *Ibid.*, 110; 7 *Ibid.*, 4.

4. There was no error in the court below, in admitting the deposition of Samuel Moser, because, from the nature of this proceeding, possession was all that the law of the land required the complainant to show; and all else coming from him, as contained in said deposition, will be rejected as surplusage, and this Court will not grant a new trial because improper evidence was admitted, unless there be probable ground to believe that injustice has been done by the admission of such testimony.—12 Wend., 41; 4 Mo. Rep., 18.

5. The court did not err in rejecting the evidence on the part of the plaintiff in error, in order to show that he was a tenant in common with the defendant in error, for that would be going into the evidence of title, which in this action is strictly forbidden. (Revised Code, title, "Forcible Entry and Detainer," sec. 25, p. 280; 6 Mo. Rep., 346; 7 *Ibid.*, 158; 4 Bibb, 192; 3 Marshall, 344.) No title

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of any kind is in question in this proceeding.—1 Pirtle's Dig., 44, and authorities there cited.

6. The court did not err in its instructions to the jury, nor in overruling the motion for a new trial.

7. The verdict of the jury is in accordance with the law of the land, and the court did not err in entering up judgment for double the amount of the damages assessed by the jury.—See session acts of 6 Mo. Rep., 346.

8. It is not known by what authority Augustine comes at this late day, and complains that judgment has been entered up against him for an amount over and above the penalty of his bond, when neither himself nor any one for him, moved the court below to correct the same.

9. And even if there was error in the court below in entering up judgment against Augustine, yet this Court will not reverse the same for that reason, but will enter a *remittitur* for the amount over and above the penalty of his bond.—Rev. Code, 468, 469; 4 Mo. Rep., 423.

TOMPKINS, Judge, delivered the opinion of the Court.

This was an action of forcible entry and detainer, commenced on the 9th day of November, in the year 1841, by Jacob Blattner, the appellee, against the said Gabriel Hoffstetter and John Strasser, before a justice of the peace: Strasser was acquitted before the justice, and Hoffstetter found guilty. Hoffstetter appealed to the Court of Common Pleas, where judgment was rendered against him, and security was given in his appeal bond for two hundred and fifty-six dollars for damages, besides rent at thirty-two dollars per month.

On the trial of the cause, Blattner, the defendant in error, produced as a witness one Moser, who stated, that he had rented, since the month of March preceding, the house about which this suit was commenced, from Blattner: it is the same of which Hoffstetter and Strasser then had possession; that he left the house on the first Thursday in November; he left some things in the house; he locked the house, and gave the keys to Blattner; when he left the house he nailed the windows down, and made every thing secure about the house; he went back on Friday for some of the things he had left; on Saturday he went after the remainder of the things, and then it was he first saw two men in the house, and one of them was Gabriel Hoffstetter; he asked them how they got in, and they said that Strasser opened the house in the night, and in the morning they were put into possession; he saw one of the windows broken; that Blattner owned the house, and he rented it from him.

On his cross-examination he stated, that he rented the house from Blattner; that he had a lease in writing at twenty-five dollars per month; that Blattner owned the house, and he sold it to Blattner; that he did not recollect at what time he sold it to him. Being asked whether he sold Blattner the whole house or his interest in it, and the question being objected to, he answered, "I sold Blattner the property; I built the house, and paid for it; Mr. Strasser worked upon the house; Mr. Strasser was a partner of mine in building this house; I never paid

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any thing for the work he did on the house; I did not sell the house to Blattner to cheat Mr. Strasser; Strasser never lived in the house as the tenant; Strasser boarded with me in Second-street, and did not pay me; Strasser never slept in the house on Fourth-street, that I know of; I never did threaten to shoot Mr. Strasser; when I moved into the house, Mr. Strasser was not there; sometimes he was in the house, sometimes with his wife while the house was building." The remaining part of the testimony is very little more than a repetition of what he had before stated. He, however, stated further—"the one pane of glass up stairs was not broken when he left the house; that he did not rent the house of Blattner when he first occupied it, because he owned it; that he lived there all the time till November." The testimony of Moser was objected to, because the instruments of writing therein mentioned were not produced, and because said testimony contained evidence of title.

Stoffield, a witness on the part of the plaintiff, Blattner, testified also, that Moser left the house on the third or fourth day of November. He left some lumber in the house, and the plaintiff gave the keys to the witness, who removed the lumber and went through the house, locked all the doors, and nailed down the windows. This was done on the 5th day of November, and on the next day the witness went down with the plaintiff to the house, and found the two families in it. There was an old iron key in the house, newly filed, and one pane of glass was broken. Moser had been living in the house ever since it was built. He did not see Hoffstetter in the house. He saw no person there but some women. He knew that Jacob Blattner, the plaintiff, never lived in the house or on the premises in question. McGlosky, a witness of Blattner, the plaintiff below, defendant in error, stated that he had leased the premises in question on the 1st of November, for one year, from Blattner: the lease was then set out. The witness said he did not arrive in St. Louis till the ninth, and finding the house occupied, he and Blattner annulled the lease.

The plaintiff here closed his evidence. The defendant then moved the court to instruct the jury that the plaintiff could not recover on the evidence given:

1. Because at the time of the alleged forcible entry, viz., on the 6th November, McGlosky had a lease of the whole premises, and Blattner had no right of possession.
2. Blattner never had any actual possession of the house or premises, by occupancy or otherwise, before the commencement of this suit.
3. Because it appeared, from the evidence, that Moser and said Strasser were partners in the house, and consequently both entitled to possession.
4. Because there was no evidence of any violence committed by the defendant in his entry upon the premises.
5. Because the house was vacant at the time of said entry.
6. Because there was no evidence that any demand of possession was made of the defendant before the commencement of the suit, by any person authorized to take possession.
7. Because there was no evidence of right of possession in Blattner.

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The defendant's motion was overruled, and exceptions taken to the decision of the court on the motion.

The defendant, plaintiff in error, then proved, that when he moved into the house it was empty; it was done in the morning, at no unusual time of the day, or, as one of the witnesses expressed it, he saw nothing about the proceedings of Hoffstetter, in going into the house, to excite his surprise; that he knew nothing of the difficulties between the parties. Strasser was in company, and had a key with which the door was unlocked. A lease from Strasser to Hoffstetter was also proved.

Hoffstetter also offered to prove, that on the 20th of June, 1840, he was tenant in common of said premises with said Moser, under a lease for fifty years, from the city of St. Louis, and that he, Strasser, had built the house thereon. Strasser, it appeared from the lease above given in evidence, had leased one-half of the premises to Hoffstetter.

The Court of Common Pleas excluded this evidence.

Another witness of the defendant proved that Strasser occupied the house a short time after it was built, and before Moser took possession. This witness stated, that Moser came to the house, and told Strasser to let him occupy the whole house as a boarding-house. Strasser refused, and Moser threatened to shoot him if he did not go away and give up the whole house. Moser drove off Strasser from the house. The house was finished in the Fall of 1840. This witness was present at the time Hoffstetter went into the house on 6th November, 1841. No other evidence deserving notice was given.

The court instructed the jury as follows:—

1st: If they believed that the plaintiff was in possession of the house mentioned in the complaint, on the 4th day of November, 1841, and that the defendant entered and took possession of the same clandestinely, by means of a false key, although no force was in fact used, or by breaking the window, this amounts to a forcible entry in contemplation of law.

2d: To establish the plaintiff's possession, it is not necessary that he or his family should have been in the actual occupancy of the house; a man may have the possession of a house otherwise than by living in it; he may have part of his goods there, or he may be put into the possession by the party who lives in it going out, and formally taking him to the house, and in the presence of witnesses delivering him the key, or saying that he gave up the possession to him.

Judgment being given for Blattner against Hoffstetter, Hoffstetter moved for a new trial, for many of the common reasons arising out of the conduct of the jury in finding the verdict, and of the court in construing the law arising in the facts of the case.

The points material to the decision of this case are —

1st: Had Blattner, the defendant in error, a possession such as to authorize him to maintain an action of forcible entry and detainer?

2d: Ought the testimony of Moser to have been excluded?

3d: Ought the Court of Common Pleas to have admitted the evidence that

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Moser and Strasser were joint tenants, or tenants in common of the contested property, by purchase from the city of St. Louis?

The two first points will be considered together.

It never was contemplated by the legislature that the rights of the parties to the disputed property should be tried in this form of action. The 25th section of the act concerning forcible entry and detainer, page 280 of the Digest of 1835, provides, not only that the merits of the title shall in nowise be inquired into in any complaint exhibited by virtue of this act, but that it shall not extend to any person who has been in the uninterrupted occupation of the premises, even for three years next preceding the complaint exhibited. He stated, that he rented the house from Blattner from March to November, when he quit. He then locked the doors and quit, and gave the keys to Blattner. Stoffield, a witness for the plaintiff, Blattner, said, that when Moser quit the house, he left some *lumber* and *truck* in it, and gave it to him, the witness; he went to the place, and got the lumber. The plaintiff gave the witness the keys of the house. He stated also, that "a woman, who had worked for Moser, had something in the house, and Blattner, the plaintiff, gave her also the key, and the woman took her things away, and gave back the key to the plaintiff." Whether the delivery of the keys of a house, it being locked, would be a delivery of the house, would depend on the intention with which the keys were delivered; that intention cannot be doubted here, nor can it be doubted with what intention Blattner accepted them. He takes them, and exercises the rights of ownership over the house, giving permission, first to Stoffield, the witness, to take the key and carry out the property which Moser had left there for him; next he gives the key to the woman, with permission to carry off her property.

But it is contended that Moser's testimony is inadmissible, because he spoke of the sale of the land or lot on which the house stands, and a lease, and neither the deed nor lease were produced. It does not appear in evidence that there was a deed; and if Blattner chose to risk the honesty of Moser, he had a right to do so. But it was not the object of Blattner, in this case, to show in himself a title in fee simple to this property, nor was it his object to establish a lease from himself to Moser. All he had any occasion to prove was, that he had the right of possession, and nothing was said by him about either the lease or the sale of the land, till it was drawn out on the cross-examination. I see no reasonable, or even plausible, objection to the admission of Moser's testimony.

To sustain himself in the second point, the plaintiff in error relies on *Blount and Baker vs. Winright*, (7 Mo. Rep., 51,) and *Brewer vs. Peed*, (6 Marshall's Rep., 494.) The first case is, where the defendant in the action of forcible entry and detainer had conveyed the land to certain persons in trust, and these persons had sold the land to raise money for the purpose of the trust. Winright, who had never parted with the possession of the land, refused to deliver possession to the purchasers from the trustee, and the purchasers brought the action of forcible entry and detainer against him, and failed, of course. Had Moser, after the sale to Blattner, failed to deliver possession, and Blattner brought the action against him

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to get possession, then the case of *Blount and Baker vs. Winright* would have been in point to show that Blattner could not recover. Winright had never delivered possession of the land sold by his agents; but Moser had, and Blattner, the vendee of Moser, sues Hoffstetter, a stranger. The case of *Brewer vs. Peed*, from J. J. Marshall, is still more plainly against the plaintiff in error.

This is a summary of the case: "A. sell, and conveys land, on which he lives, to B., and without putting B. into possession, or removing from the land himself, he takes a lease for it from B." In such a case, A., though holding over after his lease had expired, cannot be removed by a writ of forcible detainer. Here is the strongest possible case: the vendee had never been in possession; the vendor had taken a lease from him, and it was decided that the vendee could not recover. In both those cases the affair was betwixt vendor and vendee. Here it is betwixt the vendee, to whom the vendor had yielded possession, and an intruder, known neither to the one nor the other of the parties to the sale. Blattner, then, I conclude, was in a situation to authorize him to sue any intruder.

3. It is contended that the evidence offered by Hoffstetter, to show that Moser and Strasser were tenants in common, ought to have been admitted, as that proof might have shown that the possession of Moser was the possession of Strasser, and therefore he might lawfully enter on his share of the premises, and reference is made to 5 Cowen, 484, and to 5 Wheaton, 124. In the first of these cases, Jackson, on the demise of *Krom vs. Brink*, the court say it is undoubtedly true, that the possession of one tenant in common, in general, enures to the benefit of all; but it is equally true, that one tenant in common may oust his co-tenant, and hold adversely to him. In that case is cited the page of Wheaton above referred to by the counsel of Hoffstetter, and the words which are transferred from Cowen, as above, are quoted from Wheaton, above-cited, *McClung vs. Ross*. The testimony of Moser showed very plainly, that he had ousted Strasser for more than a year, and if the evidence given by Blattner had not proved that Moser had ousted Strasser, the plaintiff in error has himself provided that there should be no defect of evidence on that head. One of his witnesses say, "he was present in the Fall of 1840, when Moser demanded the whole house of Strasser, and on Strasser's refusal, Moser threatened to shoot him, if he did not go away and give up the whole house;" and that Moser drove Strasser from the house. The possession was held by Moser alone, not for Strasser's benefit, and that possession was delivered over by Moser to Blattner.

The court, then, committed no error in excluding the written evidence of purchase offered by the plaintiff, Hoffstetter, to prove that Moser and Strasser were joint purchasers of the premises from the city of St. Louis.

It was also contended, that the lease made by Blattner to McGlosky gave to him all of Blattner's right of possession, and consequently Blattner could not maintain an action of forcible entry and detainer against any trespasser. This lease never took effect betwixt Blattner and McGlosky, as the latter never took possession; and further, it was cancelled on the day Blattner sued Hoffstetter and Strasser.

Hoffstetter vs. Blattner.—McDonald vs. The State.

These are all the matters arising in the case argued by Mr. Gamble. Other objections appear to have been made by counsel below, which, I think, were properly abandoned.

But the judgment of the Court of Common Pleas must be reversed, because it is for more than the amount of the appeal bond.

The cause is remanded.

McDONALD vs. THE STATE.

1. An endorsement on the back of an indictment, "A true bill," signed by the foreman of the grand jury, is a sufficient certificate, within the meaning of the nineteenth section of the third article of the act of 1835, concerning practice and proceedings in criminal cases. (Rev. Stat., 481.)—See *Spratt vs. The State*, ante, p. 247-249.
2. Where the name of the county is written in the margin of the indictment, and in the body of the indictment the county is referred to by name, as, "the county of Washington aforesaid," the venue is well laid.
3. A bank-note is personal property, and the subject of larceny, within the meaning of the thirty-second section of the third article of the act of 1835, concerning crimes and punishments. (Rev. Stat., 1835, p. 178.)—See *The State vs. Newell*, 1 Mo. Rep., 2d edit., p. 177.
4. In an indictment for stealing bank-notes, it is not necessary to allege that the bank is a chartered institution, authorized by law to issue notes.—See art. 6, sec. 20, act concerning practice and proceedings in criminal cases, Rev. Stat., 1835, p. 491.

ERROR to the Circuit Court of Washington county.

ANDERSON, for Plaintiff in Error.

POINTS AND AUTHORITIES.

1. It does not appear, from the face or body of said indictment, when it was found, nor in what court, nor at what term of the court.—See *Kirk vs. State*, 6 Mo. Rep., 469. Nor is said bill of indictment certified by the foreman of the grand jury, according to the directions of the statute.—See Digest 1835, p. 481, sec. 19.

2. There is no sufficient venue laid in said indictment.—See *State vs. Grove*, 1 Mo. Rep., 547; *State vs. Palmer*, 4 Mo. Rep., 453.

3. There is no offence known to the laws of this State, sufficiently charged in said indictment.—See Digest 1835, p. 178, art. 3, sec. 32; 2 Russell on Crimes, p. 186, margin 170; also, 2 East's Crim. Law, 749, *Sade vs. Morris*; Same, p. 601, Craven's case.

4. The first count in said indictment is too general, vague and indefinite.—*Vide* Mo. Rep., p. 547; *People vs. Holbrook*, 13 Johns. Rep.

5. The *second* count is void for duplicity and uncertainty—is defective in not averring that the Bank of Illinois was a chartered institution, authorized by law to issue notes, &c. The exceptions to the first count also apply to the second.—*Vide* Digest 1835, p. 491, sec. 20.

6. The *third* count is repugnant, uncertain and void.—See *State vs. Hardwick*, 2 Mo. Rep., 226; *Jane vs. State*, 3 Mo. Rep., 61.

TOMPKINS, Judge, delivered the opinion of the Court.

Thomas McDonald was indicted for larceny at the February term of the Circuit Court of Washington county, in the year 1842. The indictment contained three counts. The defendant was found guilty, and, to reverse the judgment entered upon that finding, this writ is prosecuted. There was a motion in arrest of judgment, which the Circuit Court overruled.

For reversing the judgment, the following points are made:—

1. It does not appear, from the face or body of the indictment, when it was found; in what court, or at what term.—Reference to *Kirk vs. State*, 6 Mo. Rep., 469.

Said bill of indictment is not certified by the grand jury, according to the statute.—Reference to Digest of 1835, sec. 19.

2. There is no venue in said indictment.—Reference to *State vs. Cook*, 1 Mo. Rep., 547; *State vs. Palmer*, 4 Mo. Rep., 453.

3. There is no offence known to the laws of this State sufficiently charged in said indictment.—Reference to Digest, p. 175, art. 3, sec. 32.

4. The first count is too general and indefinite.

5. The second count is void for duplicity and uncertainty, and is defective in not averring that the Bank of Illinois was a chartered bank. The exceptions made to this count apply to the second.—Also, see Digest 1835, p. 491, sec. 20.

6. The third count is repugnant, void and uncertain.

First objection. If the counsel of the appellant had read the case of *Kirk vs. the State*, to which he refers to sustain his objection, he would not perhaps have cited it. In that case it is said, "The records of the court show in what court, and at what term this bill was found, and the caption of the indictment forms no part of the indictment. It does not give any information as to the nature of the charge, and is in fact a mere memorandum by the clerk, and becomes useful then only when the record is taken to another court." Another objection under this head is, that the bill of indictment is not certified by the foreman of the grand jury, according to the direction of the statute.—Digest of 1835, p. 481, sec. 19. That section directs the foreman of the grand jury to certify, under his hand, that the indictment is a true bill. The foreman of the grand jury did endorse on the back of this indictment, "A true bill," and subscribed his name to the endorsement. That has been decided, in the case of *Spratt vs. The State*, at this term, to be a good endorsement.

Second objection. That there is no sufficient venue; and *State vs. Grove, Cook*, is cited, 1 Mo. Rep., 548. The point there decided is, that in an indictment it is not sufficient to write the name of the county on the margin, and afterwards to

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refer, in the body of the indictment, to that name written on the margin, as the county aforesaid.

In this case the name of the county is in the margin, and in the body of the indictment the county is referred to by name, "the county of Washington aforesaid." The case of the State *vs.* Palmer and Dallam, 4 Mo. Rep., 453, is not in point. In that case the county of St. Louis being named in the margin of the indictment, and the act being in the indictment charged to have been committed at the township of St. Louis, the indictment was decided to be good.

Third objection. The thirty-second section of the third article of the act concerning crimes and punishments, is in these words: "Every person who shall steal, take and carry away any money or personal property of another, &c., shall be deemed guilty of larceny," &c. The indictment charges that he did steal, take and carry away a bank-note, for the payment of ten dollars, of the value of five dollars. A bank note is personal property; it is personal effects. In *State vs. Newell*, (1 Mo. Decisions,) a bill of exchange is decided to be personal property or effects.

Fourth objection. I have not found, on reading the first count, that it is liable to the fourth objection. That objection is too vague to deserve attention. If counsel will not point out the particular defects in the indictment, their objections cannot be considered as deserving much attention.

Fifth objection. The second count has been read, and it is not perceived that there is any ground for this objection, and none is pointed out.

It is also contended that the second count is defective, because it is not averred in that count that the Bank of Illinois is a chartered institution. The twentieth section of the sixth article of the act concerning crimes, &c., p. 491 of the Digest, declares, "that if, on the trial or other proceeding in criminal cases, the existence, powers, or constitution of any banking company or corporation became material, or in any way drawn in question, it shall not be necessary to produce a certified copy of the charter, or act of incorporation, but the same may be proved by reputation, &c."

It is difficult to perceive how it can be inferred, from this section, that it ought to have been averred in the indictment that the Bank of Illinois is a chartered institution, authorized by law to issue notes. This objection is as invalid as the others.

Sixth objection. Let it suffice to say, that I have not perceived that the third count is repugnant or uncertain, and that this defect has not been pointed out by counsel.

The judgment of the Circuit Court is affirmed.

The State, to the use of Menard, vs. Pratte and St. Genome.

THE STATE, FOR THE USE OF MENARD, vs. PRATTE AND ST. GENOME.

1. In an action on an administration bond, it is a good plea that the cause of action did not accrue within ten years.
2. The rule of law, that the State is not included with the statute of limitations, does not apply to suits on official bonds, taken in the name of the State, for the use of individuals.

ERROR to the St. Genevieve Circuit Court.

SCOTT and ZEIGLER, for Plaintiff.

COLE, for Defendants.

TOMPKINS, J., delivered the opinion of the Court.

This is an action brought by the governor, for the use of Pierre Menard, against Joseph Pratte and Auguste St. Genome, on an administration bond executed by said Pratte and St. Genome as securities, and Marie Therese St. Genome as principal, on the tenth day of May, in the year 1824.

The declaration shows that the administratrix was dead, but does not show when she died. The defendants pleaded—

1. That the cause of action did not accrue within seven years.
2. That it did not accrue within ten years.

The plaintiff demurred to these pleas, and the Circuit Court sustained the demurrer to the first, and overruled that to the second plea.

If an executor or administrator die before the final settlement of the estate, the law contemplates, in case of there being but one, that letters of administration will be again granted to such persons as they would have been granted to if the original letters had not been obtained, &c.—Thirty-third section of the first article of the act respecting executors and administrators. And by the 36th section of the same act, an executor or administrator has only seven years to sue the securities of the deceased executor or administrator.—Pp. 44, 5, of the Digest of 1835.

This was the law when these letters were granted, and continues to be so.

If the law allows but seven years to the succeeding administrator to sue the original and his securities, or the security alone, if he be dead, it cannot be reasonably supposed that no lapse of time shall bar the right of creditors to sue the securities, when their principal has died in the full enjoyment of the administration of the rights and credits of the intestate. But it appears on the record, that the demand of this plaintiff stands proved on the record of the County Court of St. Genevieve county. This is, without doubt, the case, in most instances, when an administrator is removed for neglect of duty; and if it appear that he has failed

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to pay accounts that have been long allowed, and has not accounted for his neglect, it is the best possible reason why he should be removed. And if the law require his successor to proceed against such removed administrator and his securities within seven years, it cannot reasonably be supposed that where the creditors have neglected to cause a successor to be appointed, that they should be barred from their right of action by no lapse of time. There is much better reason for limiting the right of the creditor to sue a security of a deceased administrator on the official bond, than for limiting the right of a successor to sue his predecessor and the securities. The deceased administratrix may have paid the demand which this plaintiff, in this action, has established in the County Court of Saint Genevieve county, and they may not be able to prove what she could easily have proved had she been living. She may have paid the demand in her lifetime, and have omitted to get a credit for such payment from the County Court. And if the law will not, after a lapse of seven years, admit a demand, by the successor against a preceding administrator removed for neglect of duty, it cannot be an unreasonable construction of our statute of limitations to say, that the creditors of the intestate shall be precluded, after a lapse of ten years, from proceeding against the securities of this deceased administratrix.

At what time this right of action may have accrued, it is no part of the duty of this Court to inquire: it is sufficient to say, that the demurrer admits that it did not accrue within ten years. It must not be supposed that this Court means to say that a suit cannot be commenced on an administrator's bond more than ten years after its date. The right of action may not accrue for years after the execution of the bond; for instance, it might possibly occur that the administratrix could not, in her lifetime, even obtain money, or, for anything appearing on the record, she may have died more than ten years before the commencement of this suit, and the right of action may have accrued in her lifetime.

It was objected, that this bond is like one given to the State, and that the statute of limitations does not run against the State.

The principle which prevents the statute of limitations from running against the State, does not apply to official bonds given to the State for the use of individuals, who may be aggrieved by the misconduct of those officers. In such cases, although the bond is nominally given to the State for the sake of convenience, yet, in reality, every cause of action on the bond, besides those the State may herself have, is a private concern, and not at all within the principle which, from considerations of policy, forbids the State to be barred by the statute of limitations from suing, in cases in which she herself, in her corporate capacity, may be interested. *Montgomery vs. Hermandes*, (12 Wheaton, 134,) shows that the statute of limitations on official bonds, given to the United States for the use of individuals, runs not from the giving of the bond, but from the breach of the condition; and although the condition of a marshal's bond is broken by his neglect to bring money into court directed to be brought in, or to pay it over to the party, yet, if the proceedings be suspended by appeal, so that the party injured has no right to demand the money, or to sue for the recovery of it, his right of action has not accrued so as to bar it, if not commenced within six years. This will illustrate what is said about

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the right of action accruing on an administrator's bond. The demurrer to the second plea was rightly sustained, and the judgment of the Circuit Court must be affirmed.

The cause will be remanded, and the plaintiff have leave to withdraw his demurrer, if he wish.

STATE OF MISSOURI, FOR THE USE OF ZEIGLER, vs. JOSEPH PRATTE AND
AUGUSTE ST. GENOME.

ERROR to St. Genevieve Circuit Court.

TOMPKINS, J., *delivered the opinion of the Court.*

The same disposition is made of this case as of the preceding.

HUTCHINS vs. THE STATE.

Where a witness residing in another State is here compelled to enter into recognizance for his appearance as a witness before the courts of this State, he will be allowed mileage from his place of residence.

SCOTT, Judge, *delivered the opinion of the Court.*

This was a rule on the auditor, to show cause why a mandamus should not issue against him, for refusing to allow an account in favor of the relator, for fees as a witness in the St. Louis Criminal Court, in the case of the State vs. Corl, Heyleman and Hodges, indicted for swindling.

It appears the relator, a witness, was a resident of the State of New York, and was recognized by our authorities to appear in the Criminal Court at St. Louis, to testify on behalf of the State, against the above-named defendants. He twice attended the court under recognizance, coming from Troy, in New York. The judge and circuit-attorney allowed the witness the mileage from his place of abode to St. Louis, granted by law to witnesses who are residents of the State, and one dollar for each day's attendance on court; the per diem allowance to witnesses who are not residents of the county to which they are summoned to testify. The

auditor allowed the witness fifty cents a day for his attendance,—the fee allowed by law to witnesses who are residents of the county to whose courts they are summoned to testify,—and refused to allow any mileage.

Our statute prescribes, that every account for the attendance of any witness shall be sworn to, and shall state that he was summoned to attend as a witness in the cause in which the charge is made, the number of days he attended, and the number of miles he had to travel in consequence of the summons. (See Revised Code, 272, sec. 20.) Under this section it has always been held, that a witness who lived at a distance from the place of trial, and was summoned at that place, was not entitled to any mileage, he not having travelled any number of miles in consequence of the summons. And if a witness is recognized on the part of the State, and he attends under the recognizance, he is within the meaning of the act, though he was not actually summoned. So, if a witness, who is a non-resident of the county in which an offence is committed, be recognized to attend the court in the county where the crime was perpetrated, he is allowed mileage from his place of residence, although he was recognized at the place of trial, and a witness is not deemed a resident of the county in which he is recognized.

These principles would determine this case were the witness a resident of the State: let us examine whether the circumstance of his non-residence will render them inapplicable. In the case of *Howland vs. Lennox*, (4 Johns. Rep., 311,) the Supreme Court of New York held, that if a witness resides out of the State, his estimate for mileage cannot extend beyond the State-line: and the Supreme Court of Massachusetts, in the case of *Melvin vs. Whiting*, (13 Pick.,) on the authority of the case in New York, held the same doctrine. Upon these two cases, Greenleaf, in his *Treatise on Evidence*, 360, remarks, the reasons for these decisions are not stated, nor are they very easily perceived. The cases above-cited were decided without reference to any statutory provision; and although they may justly be subject to the censure of the learned author, would be clear law in this State, where the witnesses can only claim for travel coerced by a subpoena, and a subpoena issued by the courts of a State could not be served out of its limits, or beyond its jurisdiction, and, if served, would be of no effect. But does the same principle hold with regard to recognizance? Admitting, for argument's sake,—a matter about which we express no opinion,—that another State would not allow a recognizance taken by our courts, whose object was to compel the attendance of one of her citizens as a witness, to be enforced within her jurisdiction against him, yet such a recognizance would be clearly binding in the State where taken, and the witness might be compelled to satisfy it, in case of a breach, if he were found within her limits. And when we consider the multiplied relations, both political and commercial, between the States of our confederacy, and the still stronger ties of blood and affinity between many citizens of the several States, the inconvenience of having a recognizance even binding in one State alone, to whose penalty a person is subject, may be very great. Shall our laws, then, subject a witness, who is a resident of another State, and with us in business, to a heavy forfeiture, for not attending our courts, and afterwards refuse him compensation for his attendance exacted by law, when all our own citizens

are allowed compensation for attending courts as witnesses. We will not be the first to establish a rule so inhospitable, to say the least of it, towards the citizens of our sister States. Policy requires that witnesses from abroad, who attend on the part of the State, should be compensated. St. Louis is a highly commercial place: many strangers are always there: they may become witnesses of offences against our laws; and to refuse them compensation, would necessarily, in many cases, deprive the State of their evidence. Other courts have allowed such claims. In North Carolina, witnesses are entitled to fees for attendance in behalf of the State, to be computed from their place of residence in *another* State, if recognized before they removed there. *State vs. Stewart*, (1 N. Car. Law Repos.) So, in a case in the courts of Louisiana: McFall was on a trading voyage from Kentucky, and recognized and detained till the trial, not having time to go home. His per diem fees were allowed from the date of his recognizance, but not mileage, the statute being "for every mile they shall necessarily ride going and coming." The witness' mileage, in returning home after being recognized, was not allowed in that case, the court saying his necessity of returning home did not arise from being detained as a witness. And such, we presume, would be the construction of our statute. If the trial is postponed to a distant day, so as to make it inconvenient for the witness to remain at the place till it comes on, his mileage fees for coming to the place of trial, and afterwards returning home, would be allowed. *Cowen's Phillips on Evidence*, 2, 10. In the case of *Lonergan vs. Roy*, Exch. Insurance, 7 Bingham, an item of £533 was allowed on taxation, as the expenses and compensation for loss of time of a foreign witness, sent for in good faith from Havana to England.

We are aware that, to the rule thus established, it may be objected, that many unjust and unfounded claims will be preferred, and many abuses practised on the State and county treasuries under its sanction. It is not fair to urge the abuses to which a rule may be exposed, against its existence. We must trust to the vigilance and discernment of the circuit judges and attornies to guard us against the abuses to which it may be subject. No witness, the expense of whose attendance is so great, will be permitted to be recognized, unless his evidence is indispensably necessary to convict the offender. Persons who have no fixed place of residence, will not be permitted so to abuse the rule, that they can travel about at the expense of the State or a county, and such men will not be allowed to force themselves as witnesses on the State, that they may have this privilege. No person will be allowed mileage unless his claim is *bona fide*, and beyond doubt, within the spirit of the rule. Nor will the allowance be made when there is no necessity for the witnesses to return home, after entering into recognizance, or when he returns merely for the sake of the mileage.

Peremptory mandamus awarded.

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1. The omission of the clerk of the County Court to affix the seal of that court to the certificate of the election of a justice of the peace will not affect the validity of such election, or the rights of the justice as such magistrate.—See Rev. Stat., 1835, title, "Justices of the Peace," sec. 11, p. 345.
2. A *scire facias* issued against *Conrad Carpenter*, and others, his sureties, on a forfeited recognizance. The recognizance was conditioned for the appearance of *Coonrod Carpenter*, and signed *Conrad Carpenter*. Process was not served on Carpenter. Held: First, that if considered as a misnomer of the Christian name of Carpenter, the error was waived by his failing to plead the misnomer in abatement; second, that, by signing the recognizance, he admitted that he was the person therein named *Coonrod Carpenter*.—Rev. Stat., 1835, title, "Practice and Proceedings in Criminal Cases," art. 9, sec. 14, p. 501.

APPEAL from the Circuit Court of Montgomery county.

KIRTLEY, for Appellants.

POINTS AND AUTHORITIES.

1. That Dade was not a justice of the peace, duly and legally commissioned and qualified as such, and therefore had not authority of law to take the recognizance on which the *scire facias* issued in this cause: and, in support of this point, I refer to Statutes of Mo., 345, sec. 11, 12, 13, 14.
2. That the recognizance was and is radically defective in the description of the alleged offence.—See 9 Mass. Rep., *Cone vs. Dorony*, 520; 16 Mass. Rep., 447, *Ibid.*; 17 Wend., 252, *People vs. Blankman*.
3. That the evidence offered by the State, and objected to by the defendant, was improperly admitted.
4. That the record and evidence offered and given on the part of the State at the hearing did warrant the finding of the first and second issues against the defendants.—1 Alabama Rep., 119, *Howie and Morrison vs. State*.

BAY, Attorney-General, for Appellee.

POINTS AND AUTHORITIES.

1. The demurrer to the third, fourth, and fifth pleas was properly sustained, because the pleas traverse immaterial allegations in the writ of *scire facias*.—1 Chitty, 403, 644; *Adair vs. The State*, 1 Blackford, 200; *McCarty vs. The State*, *Ibid.*, 339; 10 Wend., 434.
2. The recognizance, when filed in the Circuit Court, became a record of that court, and the only question that could arise under the first plea was, whether the *scire facias* issued on this recognizance.—1 B. and A., 153.
3. The statute requiring the certificate of the election of the justice of the peace to be under the seal of the court in writing, and the omission of the clerk to affix

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the seal thereto, cannot affect the validity of the election, or the rights of the magistrate. It was sufficient for the State to show that Dade publicly acted in the capacity of a justice of the peace: and the evidence offered by the defendants strengthen the legal presumption of the official character of Dade. The seal is no part of the commission, but merely evidence of its authenticity.—Roscoe's Crim. Ev., 6; 6 Peters, 352; Greenleaf on Ev., 94.

4. The defendant, Carpenter, has admitted, by signing the recognizance, that he is the person therein recognized. (Rev.Stat., 1835, title, "Practice and Proceedings in Criminal Cases, art. 9, sec. 14.) At all events, he should have pleaded the misnomer in abatement.—1 Bab. Ab., "Abatement, D.;" 2 *Ibid.*, "Error, K.;" 1 Chit. Crim. Law, 362-365.

TOMPKINS, Judge, delivered the opinion of the Court.

This is a proceeding, by *scire facias*, instituted by the State of Missouri against Conrad Carpenter, Joseph Parks, Frederick H. Dryden, and Thomas Dryden, requiring the said defendants to show cause why execution should not go against them for the sum of two thousand dollars, charged to be forfeited by them, by their failure to comply with the conditions of a recognizance by them entered into on the 28th day of July, 1842, before Lee M. Dade, a justice of the peace of said county. The recognizance sued on, as set out in the bill of exceptions, is in the following words, viz.:—

"Be it remembered, that on the 28th day of July, in the year 1842, Coonrod Carpenter, Joseph Parks, Frederick H. Dryden, and Thomas Dryden, personally appeared before me, Lee M. Dade, one of the justices of the peace in and for the county aforesaid, and jointly and severally acknowledged themselves to owe the State of Missouri the sum of two thousand dollars, to be levied of their goods and chattels, land and tenements, if default be made in the condition following. The condition of this recognizance is such, that if the above Coonrod Carpenter shall punctually be and appear before the Circuit Court, on the first day of the next term thereof, next to be holden in and for the county aforesaid, then and there to answer to a charge of manslaughter, and abide the judgment of the court, and not depart without leave, then this recognizance shall be void, otherwise it shall be and remain in full force and virtue in law.

(Signed)

"CONRAD CARPENTER,
"FREDERICK H. DRYDEN,
"THOMAS DRYDEN,
"JOSEPH PARKS."

*The writ of *scire facias* is preceded by a recital of the empannelling of a grand jury, and their names, and that the grand jury indicted Carpenter for the murder of a slave named Minerva, and that the defendants not appearing, their recognizance was forfeited. Then follows the *scire facias* itself, which, beginning with a whereas, recites, that on the oath of Joel Wheeler, Robert Dryden, John Sharp, and Frederick H. Dryden, the said justice Dade issued a warrant against Conrad Carpenter, stating, that whereas complaint had been made against him, upon the

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oath of the persons above named, that the said Conrad Carpenter, late of the county aforesaid, did, on or about the 24th day of July, in the year 1842, in the county aforesaid, unlawfully whip Minerva, a colored girl, so as to cause her death, and commanding the constable of, &c., in said county, to take the said Carpenter, if he be found in said county, so that he, the said constable, should have the body of the said Carpenter, forthwith, before the said justice, to answer the said complaint, and be further dealt with according to law; and afterwards, on the 27th day of July, in the year 1842 aforesaid, the said Conrad Carpenter was arrested and brought before the said justice of the peace on said warrant, and the said justice considering that there was probable cause to believe that the said Conrad Carpenter, on the 24th day of July, 1842, and in said county, had committed manslaughter upon Minerva, a slave belonging to said Carpenter, required bail in the sum of two thousand dollars of him, and thereupon the said Conrad Carpenter and Joseph Parks, Frederick H. Dryden and Thomas Dryden, on the 28th day of July, in the year 1842, before the said justice of the peace, entered into a recognizance whereby they acknowledged themselves to owe to the State of Missouri the sum of two thousand dollars, to be levied of their goods and chattels, lands and tenements, if default should be made in the condition thereof, which condition is as follows:—

“The condition of the above recognizance is such, that if the above bound Coonrod Carpenter,” meaning the said Conrad Carpenter, “shall personally be and appear before the Circuit Court on the first day of the next term thereof, to be holden in and for the county aforesaid, then and there to answer a charge of manslaughter, and abide the judgment of the court, and not depart without the leave of court, then this recognizance shall be null and void, otherwise it shall be and remain in full force and virtue in law: which recognizance was, on the 3d day of October, 1842, delivered to the clerk of said court, and now remains on file in his office; and afterwards, viz., at the next term of the Circuit Court in and for the said county of Montgomery, on the 3d day of October, 1842, and the grand jury for the State of Missouri empannelled and sworn, &c., found and brought in to said court an indictment against the said Conrad Carpenter for the murder of the said negro slave, named Minerva, &c.; and afterwards, on the 4th day of October, in the year 1842, and during the sitting of said court, the said Conrad Carpenter was called, upon his said recognizance, to appear in said court, to answer before the said court the charge contained and exhibited against him, in and by said indictment, to abide the judgment of the court in the premises, and not depart the court without leave, and came not, but then and there wholly failed to appear and answer the charge last aforesaid, and further, the said Conrad Carpenter then and there departed the said court without leave, &c., and the recognizance was forfeited.” The conclusion was as usual. Carpenter was not found, but the writ was served on Parks, Frederick H. Dryden and Thomas Dryden.

The defendants pleaded that—

1. There was no such record.
2. That, at the time of taking the said recognizance, the said Dade was not a justice of the peace.

3. That, on said 27th July, 1842, a warrant was not issued upon the oaths of Joel Wheeler, Robert Dryden, &c., by said justice Dade.

4. That said justice Dade did not consider and adjudge that there was probable cause to believe that said Conrad Carpenter, on the said 24th day of July, &c., had committed manslaughter upon Minerva, a slave, &c.

6. For further plea, &c., as to so much of the said *scire facias* as charges that the said grand jury for Montgomery county, &c., found and brought into said court an indictment against the said Conrad Carpenter, for the murder of the said negro slave, Minerva, and that, by the order of said court, when, &c., the said Carpenter was three times called upon his said supposed recognizance, at, &c., to appear in said court to answer, &c., the charge contained and exhibited against him in and by said indictment, and to abide the judgment of the court in the premises, and not depart the court without leave, and that said Carpenter came not, but made default, and then and there failed to appear and answer to the said charge last aforesaid, and then and there departed without leave of the court; and the said defendants say, that, admitting that said indictment for said supposed murder was found and brought into court, as in said writ is alleged, and admitting that said Carpenter was then and there called and failed to appear, as in said writ is set out, said defendants rely, aver, and allege that said defendants had not, at or before the time last aforesaid, given or entered into any recognizance to the State of Missouri, nor did they then and there stand bound, by any recognizance, to be and appear in said Circuit Court of Montgomery county, at the said October term for the year 1842, to answer before said court the said charge exhibited against him in said indictment for said supposed murder, &c.

Issue was taken on the two first pleas, and the three last were demurred to, and the parties going to trial on the two first pleas, judgment was given for the State.

The first plea being that there was no such record as that set out in the declaration, and the second that Dade was not a justice of the peace, and the validity of the whole proceeding depending on the fact whether Dade was or was not a justice of the peace, that matter will be first inquired into.

The counsel for the defendant relies on the 11th, 12th, 13th, and 14th sections of the act of 1835, to provide for the election of justices of the peace. (Digest, 345.) The eleventh section requires the county courts, as soon as they ascertain who are elected to act as justices of the peace in their respective counties, to cause certificates thereof to be made out, and under the seal of the court, signed by the president, and witnessed by the clerk, &c.

Twelfth. The clerk shall endorse on the back of every certificate that the person for whom it is intended shall qualify according to law, within twenty days after the receipt of the same, and in default thereof such certificate shall be void.

Thirteenth. Every person who receives a certificate of election, as a justice of the peace, shall, within thirty days thereafter, and before entering upon the discharge of his duties, cause the same, together with the oath by this act required, endorsed thereon, to be recorded in the office of the clerk of the County Court, which shall be deemed an acceptance of such appointment; and in case of his

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failing so to do, it shall be deemed a refusal thereof. The defect in the commission is, that it is not sealed; that is to say, that the certificate of the election has not been made out under the seal of the County Court, as required in the eleventh section.

The act does not declare it to be void if the seal be not annexed; as it does in case the justice fail to take the oath within twenty days, as required by the twelfth section. By the 14th section, it is declared, that a failure on the part of the person elected, to record his commission, and the oath thereon endorsed, for thirty days after the receipt thereof, shall be deemed a refusal to accept.

His own negligence only operates to produce an express legislative declaration of what shall render the commission void. By the territorial act of 21st January, 1815, p. 395 of the territorial laws, it was the duty of the Circuit Courts in the several counties in, &c., and of the clerk in vacation, subject to the confirmation or rejection of said court, to grant letters testamentary, and letters of administration, with or without any last will, &c.; and by the second section of the act of 20th January, 1816, all letters testamentary, and of administration, granted after the taking effect of that act, are required to be recorded before they are delivered to the parties by the clerk of the court granting the same, &c.

In the case of *Carroll vs. Carn*, 1 Mo. Rep., 161, this Court decided, that although no letters of administration had been issued, (and consequently they could not be recorded,) yet the entry of the grant of letters of administration on the record conferred on the grantor the rights, and also imposed on him the duties of administrator. Judge Cook, in stating the case, says, "The points presented for the consideration of this Court, and relied on for the reversal of the judgment of the Circuit Court, are, that the court erred in sustaining the demurrer to the plea of non-assumpsit, and also in refusing to exclude the record of the letters of administration offered in evidence by the plaintiffs. Those who desire to read what is said on that demurrer, can refer to the case. But as I can speak understandingly of this case, I will here say that Carroll's counsel did not expect to be able to prove anything for his client under that plea, nor did the counsel of Carn fear anything could be proved; but that plea was put in, and it was demurred to by an agreement betwixt the counsel, merely to get the court to decide whether the plea of non-assumpsit without an affidavit was good, under the second clause of the 23d section of the act to regulate judicial proceedings, p. 250 of Geyer's Digest. And it was privately agreed, that the party in whose favor the other point was decided should have judgment when the cause should be remanded to the Circuit Court. The court gave an opinion, rather elaborate, on the demurrer to the plea of non-assumpsit, and contented itself with one line on the other point, viz., the refusal of the Circuit Court to exclude the record evidence of the letters of administration. These are the words in which it expresses itself on that point: "On the other point we see no error in the record."

It was, in that case, made the duty of the clerk to record the letters of administration before he delivered them, and the consequence of neglect was, that they should not be received in evidence in any court of the territory. In the case of the justice's commission in this cause, no consequence of the neglect of the court

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to seal that commission is declared by the law itself. As there was evidence on record that Carroll had been appointed administrator, so there is record evidence that the County Court had ascertained Dade to have been elected a justice of the peace: that court caused the certificate of election to be issued; it was signed by the president, and witnessed by the clerk; every other provision was complied with, but the court did not cause it to be issued under its seal. If this had happened by the negligence of Dade, there might be some reason for saying that the commission should be void, as it is declared to be, in case the newly elected person do not cause his commission to be recorded.

But, by the above-cited second section of the act of 1816, letters of administration were required to be recorded, under pain of not being received in evidence in any court of record in any county of the territory; and yet this Court held the grant itself was not void, and that the record of the grant might be read in evidence, although no letters had issued, and consequently there could be no record of them. The commission of Dade, then, it seems, ought to be held to be valid, although not having the seal of the court attached. The interest of the community requires such a construction, and the law does not in terms forbid it.

The second plea being disposed of, I come now to the first — That there is not any record of the said supposed recognizance remaining in said Montgomery Circuit Court, &c. The recognizance is sufficiently set out in the writ, so is the condition, and it is also averred in said writ, that Carpenter was called upon his recognizance to appear in said court, to answer before said court the charges exhibited against him in and by said indictment. It being thus averred that he was called to answer upon his recognizance, which recognizance had been immediately before set out; if the officer calling him did, in reality, call him to answer on an indictment for murder, he deserved very little at the hands of the State, and to that silly proclamation, if Carpenter had not before escaped, might be attributed his failure to answer. The probability is, that the officer knew his duty better. It was enough to call him on his recognizance, and the mention made here of the indictment for murder is a mere excrescence.

The defendants were, in law, bound to know that, the principal being held to bail for a species of homicide called manslaughter, the grand jury might well collect testimony which would authorize them to attach the crime of murder to that homicide. But the defendants contend, that the recognizance is radically defective in the description of the alleged offence, and to sustain this charge the defendants cite the *Commonwealth vs. Downey*, (9 Mass. Reports, 492.) The condition of the recognizance in that case is, that if the defendant shall prosecute an appeal from a judgment given against him in a municipal court holden, &c., for the sum of fifty dollars, and recognize in the sum of one hundred and fifty dollars for his being of good behavior for the three years, &c.

It was then averred that the recognizance was transmitted to the Supreme Judicial Court, at the term to which the defendant appealed, and was there duly entered of record. There was a demurrer filed to this proceeding, and the causes assigned were, first, that it does not appear that the said proceedings had before the municipal court on said indictment have been returned or certified to this Court,

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or are of record here; second, that it does not appear that the proceedings on said indictment, before said municipal court, are the same judgment in the said recognizance mentioned; third, that it does not appear, by said recognizance, that the said judgment, therein specified to have been given against the said Thomas, was rendered in favor of the said Commonwealth, or of any other person. The court said, "a recognizance should recite the cause of its caption; it is also a well settled principle, that a *scire facias* can issue from no court, but one in the possession of the record upon which it issues. For these reasons the Commonwealth can take nothing by its writ."

The only record now before us is the recognizance on which this *scire facias* has issued, and it is averred that this recognizance was, and still is, in said court. I shall not notice several other cases cited, as I do not conceive they are in any manner relevant. But the main objection to this record is, that in the recognizance the name of the principal is written Coonrod, and that he is in the whole proceeding called Conrad, and that he himself has signed his own name Conrad. Let it be admitted, that we cannot judicially know that Coonrod is the true pronunciation of this name, which Carpenter has written Conrad, are we equally precluded from noticing judicially that there are two classes of words in the English language, in the one of which the single letter "O" assumes the sound of the double letter "O," in moon, coon, &c., and in the other, the letter "A" claims the sound of the short "O," in the words nod, rod, &c.? so that, by giving to the two vowels, "O" and "A," in the baptismal name of Carpenter, the sounds of each of those letters in its respective class above-cited, we have the name Conrad pronounced Coonrod, as in the recognizance it is written. But suppose again, that we cannot judicially know that these letters "O" and "A" are entitled to the sounds above-mentioned, in any words whatever; we are then bound to take judicial notice that Coonrod is a misnomer of Conrad, and as such that it ought to have been pleaded in abatement by himself, if any advantage were sought to be obtained from the mistake.—1 Chitty's Criminal Law, pp. 362–365, which refers to the following passages in Bacon Abridg., where it is said—"Misnomer is a good plea in abatement," &c.; and again, "but though a defendant may, by pleading in abatement, take advantage of a misnomer, when there is a mistake in the writ or declaration, as to the name of baptism or surname, yet in such a plea he must set forth his right name, so as to give the plaintiff a better writ." And "one defendant cannot plead misnomer of his companion; for the other defendant may admit himself to be the person in the writ." "The defendant, though his name be mistaken, is not obliged to take notice of it, and, therefore, if he be impleaded by a wrong name, and afterwards be impleaded by his right name, he may plead in bar the former judgment, and aver that is '*una et eadem persona*.'"—1 Bacon Ab., letter D., in the title, "Abatement." In 1 Chitty's Crim. Law, it is said, "And the proper time to take advantage of it (misnomer) is upon arraignment, when he is called on to answer." And in 2 Bacon's Ab., title, "Error," letter K., 5, we find, that "a man shall never assign that for error which he might have pleaded in abatement, for it shall be accounted his folly to neglect the time of taking that exception."

In this cause, Carpenter and his sureties are called to be recognized; he hears his name called and pronounced Coonrod Carpenter, as it is written in the recognizance; and when, in compliance with the provisions of the fourteenth section of the ninth article of the act to regulate the practice and proceedings in criminal cases, he subscribes this recognizance, (page 501 of the Digest of 1835,) with his properly written name, Conrad Carpenter, he as much admits the name Coonrod, written by the justice in the condition of the recognizance, to be the same, and thereby precludes himself from assigning it for error, as if he had pleaded not guilty, or had been convicted on an indictment in which he was charged as Coonrod Carpenter; and if his co-defendants cannot plead a misnomer for him, as we have seen above, (1 Bacon, title, "Abatement," letter D,) much less can they now, when the judgment of the court has been rendered against them, come in and assign that for error, which, we are told above, he himself could not assign after verdict, having neglected to plead it in abatement. But whatever error might have been committed against Carpenter himself, had he been a party to this proceeding, the present defendants can lay claim to no benefit therefrom; for, according to the above-recited rules of pleading, they have, by each of their five pleas in bar, admitted that their principal was rightly named in the recognizance; and he certainly admitted it when he subscribed his name to the recognizance, and if he fraudulently made that admission, they are participators in that fraud.

Demurrers were filed and sustained to the third, fourth, and fifth pleas, and it seems they were correctly sustained; for if, as stated in those two first pleas, the justice of the peace acted without due deliberation, and thereby oppressed these men, he subjected himself thereby to a prosecution on the sixteenth section of the sixth article of the act concerning crimes and punishments, and there that matter must end; for the abuse of his authority by the justice could not be received as evidence of the innocence of the principal in the recognizance, nor would it relieve him of the obligation to appear and answer.

The fifth plea tenders an issue equally immaterial with the third and fourth. Carpenter ought to have appeared to answer when called on his recognizance. He had been called, as appears of record, for such purpose; and if the officer making the proclamation unwittingly added any thing about the indictment, that was an injury to the State, by giving him such notice as to apprize him of his danger, and enable him to escape, but it did not either avoid or vitiate his recognizance.

The judgment must, therefore, be affirmed, Judge Napton concurring.

SCOTT, J., *dissenting.*

POWERS AND ASHLEY vs. T. AND C. WATERS.

1. After the dissolution of an injunction, staying proceedings at law, and the awarding of damages, the court, as a court of chancery, has nothing to do with the case; the parties should be left to proceed in their suit at law.
2. When an injunction is asked for to stay proceedings at law before judgment, it will only be granted upon terms, so as to leave the party at liberty to proceed to trial and judgment, unless a discovery is sought for to aid a defence at law, or the answer is, in some other way, necessary on the trial.

APPEAL from Benton Circuit Court.

HENDRICK and PHELPS, for *Appellants*, insist—

That the court erred in making said decree, and in overruling the motion to set it aside.

That said decree was made at the return term of said bill, which was erroneous.

The defendants, T. & C. Waters, were made parties to said bill, because they were the holders of one of the bonds given for the payment of the purchase money; they had a suit pending against plaintiffs to recover part of the purchase money, and plaintiffs prayed that further proceedings in said suit be enjoined.

After injunction granted, it would be no breach of the injunction to proceed to judgment in the suit at law.—3 P. Williams, 147; 2 Com. Dig., 230, 232; 3 P. Williams, 395; 1 Mad. Chan., 131, 2; 3 Bac. Abr., 648, 656.

The injunction being dissolved, T. & C. Waters had the full benefit of their suit at law, but the chancery court gives them a decree for the amount they ought to recover from plaintiffs at law.

This is different from enjoining a part of a judgment: in such case plaintiff in judgment collects the amount of his judgment not enjoined, and if the injunction is continued until the final hearing of the bill, the court may then make a decree for the amount the plaintiff in judgment, and defendant in bill, is entitled to recover.

This is a final decree as to T. & C. Waters, and made at the return term of the subpoena.

The cause was not set for hearing at the time decree was made. The trial term was the next term after.—Digest, 510, sec. 18, 19.

For the reasons aforesaid, the appellants pray that said judgment be reversed.

WINSTON, for *Appellees*.

I conceive the points in this cause are—

1. Did the court err in dissolving the injunction? I contend it did not, the answer of the defendants having denied all the equity of the bill, and the complainants not making any affidavit of evidence to contradict the answer.

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2. Did the court err in decreeing the complainants to pay to T. & C. Waters the amount enjoined? I contend there is no error in that.—See 4 Mo. Rep., 7.

3. The court ought to dismiss this appeal as it at present stands, only one part of the cause being before the court; the cause, as it respects Heath and the rescission of the contract, still being in the court below.—1 Mo. Rep., 354, 365.

4. The court erred in granting the injunction in favor of the complainants, as they filed no bond as required by statute.—See Rev. Code, 314, sec. 11.

Scott, J., delivered the opinion of the Court.

Powers and Ashley filed their bill in chancery for relief, and an injunction to restrain T. & C. Waters from prosecuting an action at law against them on a bond, which they had executed to Richard B. Heath, and which the said Heath had assigned to the said Waters.

An injunction was granted, staying the proceedings at law. The injunction was prayed for and granted before there was a judgment in the suit at law. T. & C. Waters and others filed their answer to the bill, and thereupon the court dissolved the injunction staying the proceedings at law, and at the same time, and in the chancery suit, entered up a judgment in the case at law, whose proceedings had been stayed by the injunction.

It is only necessary to state this case, in order to show the irregularity of the proceedings in the court below. A suit is pending at law; an injunction is obtained to restrain proceedings in the suit, before there is any judgment; upon the coming in of the answer, the court dissolved the injunction, and then, as chancellor, entered a decree in the suit at law for the debt sued for, and awarded an execution.

The duty of the court was plain. After dissolving the injunction, the parties should have been left to proceed at law in the suit, from the prosecution of which they had been enjoined. So soon as the injunction was dissolved, and damages awarded, the court, as a court of chancery, had nothing to do with the case.

It may be appropriate to remark here, that when an injunction is asked for, staying, before judgment, proceedings in a suit at law, a court of chancery grants the injunction upon terms only, so as to leave the party at liberty to proceed to trial and judgment, unless a discovery is sought for to aid a defence at law, or the answer in some other way is necessary on the trial. (*Ham vs. Schuyler*, 2 Johns. Ch. Rep., 240; *Smith's Chancery Practice*, title, "Injunction.")

It was objected, that an appeal did not lie upon an order dissolving an injunction. This Court so held in the case of *Tanner vs. Irwin and Cottle*, (1 Mo. Rep., 65.) It is not intended, by any thing before said, that the mere order dissolving the injunction is erroneous.

Had the court below confined itself to a simple dissolution of the injunction and an award of damages, the decree would not be erroneous; but under the circumstances, it will be reversed; the reversal, however, not to have the effect of reviving or continuing the injunction.

Decree reversed.

*Walker vs. Keile.***WALKER vs. KEILE.**

An instrument of writing will not be considered as sealed merely because a scrawl is affixed to the signature of the party, by way of seal. There should be something in the body of the instrument showing that the maker intended it as a deed. The words, "This indenture," will not be considered as expressing such intention.

ERROR to Benton Circuit Court.**MILLER and WINSTON, for Plaintiff.**

The plaintiff in error insists that the deed is insufficient, and ought to have been excluded by the court below.

The bill of exceptions shows the defendant below objected to the reading of the said deed, and that his objection was overruled. As to whether the instrument above referred to is a sealed instrument or not, see Rev. Code, Mo. Laws, p. 118, sec. 3; 3 Mo. Rep., p. 80, and 5 Mo. Rep., p. 281. The evidence offered by the defendant below, of a parole agreement, ought to have been given, if for no other purpose, to mitigate damages. The plaintiff in error moved for a new trial, which was refused.

PHELPS, for Defendant, insists—

1. That the court erred in permitting the sheriff's deed to be read in evidence.
2. In permitting the transcripts to be read in evidence.
3. In overruling a motion to exclude from the consideration of the jury said deed and said transcripts.
4. In refusing to grant a new trial.

The determination of the two first points settles the case.

The deed (page 8) begins, "This indenture," to which the person executing it has affixed a seal, as appears by the bill of exceptions.

Unless a scrawl was affixed to this instrument by way of seal, the instrument of writing need not be expressed on the face thereof to be sealed. If it was the fact, that it was not sealed, but a scrawl affixed to it, the bill of exceptions should have so stated.

There is no other method to represent the seal on a sealed instrument than the method here adopted. On this point the case of *Cartmill vs. Hopkins*, 2 Mo. Rep., 220, and the case of *Boynton vs. Reynolds*, 3 Mo. Rep., 79, show that this Court will not presume a scrawl was affixed to an instrument described like the one in the bill of exceptions. We therefore contend, there was no error in receiving said deed in evidence.

Second point, as regards the transcripts:—They were proved to have been filed with the clerk of the Circuit Court before they were read in evidence.—*Vide* p. 15, (*Vide* transcript, pp. 15–18.) The transcripts all show that executions had been

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issued by the justice of the peace, and returned, "No property found to levy on," by the constable.—*Vide Burk vs. Flourney et al.*, 4 Mo. Rep., 116; Digest, 364, sec. 19, 250, sec. 4. The sheriff's deed and the transcript having been properly received in evidence, the court did not err in refusing to exclude them from the jury, and in refusing to grant a new trial.

SCOTT, J., delivered the opinion of the Court.

This was an action of ejectment brought by Keile against Walker, to recover possession of a tract of land. On the trial Keile had a verdict and judgment, to reverse which Walker has sued out this writ of error.

The land in controversy, it seems, was sold under several executions issued against Walker, and Keile becoming the purchaser, he received an instrument from the sheriff, purporting to be a conveyance of the land. This instrument, in the body of it, was termed an indenture, and had a scroll annexed to the signature of the sheriff, but there was nothing in the body of it by which the scroll was recognized as a seal.

On the trial, this instrument, purporting to be a deed, was read in evidence, to which Walker objected, but his objection was overruled.

The question is, whether this writing, purporting to be a conveyance, should have been rejected as evidence? That a deed from the sheriff is necessary, to convey to a purchaser such a title as will maintain an ejectment, is not questioned by the parties: and where a scroll is annexed, by way of seal to an instrument, that it is necessary to recognize the scroll as a seal in the body of it, in order to give it the force and effect of a sealed instrument, has long since been settled by this Court; *Cartmill vs. Hopkins*, 2 Mo. Rep., 220.

It is contended that the present case is like that of *Boynton vs. Reynolds*, 3 Mo. Reports; and, like that case, it does not appear from the record but that the deed was actually sealed. In the case referred to, the instrument sued on was termed a sealed note, and from the report of it it appears that to the signature of the party sought to be charged there was annexed the word *seal*, included in brackets, thus, [Seal.] Upon these matters appearing upon the record, the court was of the opinion that if the instrument was actually sealed there was no other mode of making the fact appear than that adopted by the clerk.

In the case now before us, there is nothing contained in the record from which the court can infer that the instrument was actually sealed. The instrument is set out, and to it is annexed a scroll, and there is nothing in the body of it from which the court can ascertain that the scroll is recognized as a seal.

We will not say there was no other mode of showing that the instrument was actually sealed, had that been the case, than that employed by the clerk.

It will hardly be contended that calling the instrument an indenture in the body of it is a sufficient recognition of the scroll as a seal.

In cases of this kind parties should be particular, and see that the real character of the instrument appears from the record.

Judgment reversed.

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HALSA vs. HALSA.

A father promised his son, that if he would remove to a piece of land belonging to, and near the residence of the former, he would give the land to his son. The son, at the time of the promise, had a family, and lived in a distant part of the country. He accepted the offer and removed to the land, and his father assigned to him the certificate of entry of the land, in these words: "I, Joseph Halsa, do *sine* the within certificate over to Amos Halsa, which is to empower him to lift the deed in his own name.—April 18th, 1835.—JOSEPH HALSA." *Held:*

1. That the assignment on the certificate was a sufficient note or memorandum to take the transaction out of the operation of the statute of frauds, and passed to the assignee an equitable right to the land.
2. That it was not necessary that the assignment should state the consideration of the transfer, for it is not necessary that the consideration of the agreement should be in writing, in order to take the transaction out of the operation of the statute of frauds.
3. That the removal of the son to the land, upon the faith of the promise made by his father, was a valuable consideration to support such assignment.
4. Benefit or advantage to the grantor is not the test of the value of a consideration. Inconvenience, trouble, or expense, borne by the grantee, will make the consideration as valuable in law as benefits conferred on the grantor.
5. Although it is well settled, that a purchaser with notice of the equity of another, from one who purchased without such notice, may protect himself under the first purchaser, yet if there are suspicious circumstances attending the purchases which are unexplained, and the answer of the first purchaser is evasive, and does not respond to all the material allegations in the bill, it may be inferred that the first purchaser was not a *bona fide* purchaser, and consequently that the second purchaser was not protected under the first.
6. It seems that a purchaser without notice, to be entitled to protection, must not only be so at the time of the contract or conveyance, but at the time of the payment of the purchase-money.

APPEAL from the Chariton Circuit Court.

Jo. DAVIS, for *Appellants*.

Only two points are presented by the facts in this case:

1. Whether the removal of complainant from Livingston to Chariton county, upon the proposition of his father, that he would give him the land, form a valuable consideration, which, together with the meritorious consideration of blood between father and son, is sufficient in equity to entitle the son to a decree of title, as against his father, upon the assignment of the duplicate.

As to this point, see *Littell's Select Cases*, 22, 30, 77; 2 *Story's Equity*, 250; *Pulvertoft vs. Pulvertoft*, 18 *Vesey*, 99; *Bunn vs. Winthrop*, 1 *Johns. C. Rep.*, 336, 7.

2. Whether the assignment of the duplicate to complainant, and his actual possession of and cultivation of the land, in pursuance of such assignment, was sufficient to put Heart and Parkes on inquiry as to the ownership of the land at the time they respectively purchased.

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As to this point, see *Bartlett vs. Glascock*, 4 Mo. Rep., 67; *Knox vs. Thompson*, 1 Littell, 350; *Barbour vs. Whitlock*, 4 Monroe, 196; 1 Story on Equity, 389.

In relation to the first point—

It is insisted for complainant, that a *gift* by a father to a son is not treated as other voluntary acts, where no relation exists. Blood is considered as a meritorious consideration in equity.—See the cases above referred to in Vesey and in *Johns. C. Rep.*

But in addition to this, here is a valuable consideration—the removal from Chariton to Livingston county.—See *Allison vs. Congleton*, Littell's Select Cases, 30, where the removal of a son-in-law was held a valid consideration. See, also, *Pauling vs. Speed*, in same book, p. 77, where blood was held a sufficient consideration for the assignment of a title-bond for land. See, also, the cases in same book, p. 22, of *Leforce vs. Robinson*.

In relation to the second point—

There is an abundance of evidence in the record to show that both Heart and Parkes had notice of the claim of complainant to the land, at the times they respectively purchased. A. Finnel proves, that Heart told him, that the old man Halsa was about to get five or six acres of the land from Amos for him; Heart, to cultivate; there is also proof that he lived in one mile of complainant for several years before he purchased, and that all the while complainant was cultivating this land. Littleton and Finnell both prove that Parkes knew of the assignment of the duplicate to Amos by his father.

10. *CLARKE, for Appellee.*

The points made and relied on by the appellee, to sustain the judgment of the Circuit Court, are—

1st. That the promise made, if at all, by the appellee, was a voluntary promise, without any *valuable* consideration, to be executed in future, and cannot be enforced.—6 Vesey, 606; 3 Marsh, 445; 5 Monroe, 408.

2d. That if there was such an assignment made as is alleged in the bill, it was but verbal, and cannot therefore be enforced.—1 Bibb, 203; 4 Bibb, 59; 3 Randolph, 238; 1 Sugden on Vendors, 130, 203, 189, 198, 190, 313–315.

3d. That, admitting the agreement made by the appellee with the appellant was binding as between them, yet a third party, who purchased without notice of complainant's claim, and the nature of it, cannot be affected by it.—Story's Equity, vol. i., pp. 75, 119, 120, 398, note, and the authorities there cited.

11. *SCOTT, Judge, delivered the opinion of the Court.*

This is a bill in chancery, filed by the appellant, complainant, against the defendants, appellees, in which it is represented that the complainant, in December, 1837, was residing in Livingston county, as now formed, in this State; that at the same time the defendant Halsa, his father, resided in Chariton county, in the possession of a considerable estate; that the complainant had just married, and

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was poor, and received about this time a proposal from his father, expressing his willingness to give him a tract of land near his residence if he would return; that he accepted the proposal, and in March, 1835, returned to his father, who, in compliance with his promise, put the complainant in possession of the tract of land, containing eighty acres, now in dispute, and assigned to him the certificate of entry, which was the evidence of the purchase of the land by his father from the United States. This occurred about the middle of April, 1835. The assignment of the certificate is in these words: "I, Joseph Halsa, do *sine* the within certificate over to Amos Halsa, which is to empower him to lift the deed in his own name.—April 18, 1835.—Joseph Halsa."

The certificate was delivered to the complainant, and he has retained it ever since; and he has since that time been in possession of the land, part of which has been cultivated by him. It was the belief, both of the complainant and his father, that the assignment of the certificate would enable the complainant to receive a patent for the land in his own name; that he accordingly applied for a patent, but was informed that it would issue in his father's name. He then applied to his father for a deed in January, 1836, but he declined making one; and in January, 1841, conveyed the land to Caleb Hart. It is charged, that Hart purchased with notice, and on being informed of the claim of the complainant to the land, he said he would risk it; that he well knew the complainant was in possession of the land, and cultivated part of the same. Hart, in four days after he purchased, conveyed to Peterson Parks. It is charged, that Parks had notice of the claim of the complainant, and was well apprized that he was in possession of the land, and that he cultivated a part of the same. The bill prays that the title to the land may be decreed to the complainant.

Joseph Halsa admits, in his answer, that in 1834, his son, the complainant, was residing in what is now known as Livingston county; that his son had just married and commenced the world, and was poor: he denies that he made a proposition to his son, that if he would return to Chariton he would give him a tract of land; but admits that, being desirous to promote his welfare, he informed him that if he would return he would assist him to purchase some land, and assist him in other respects, as much as he could, in justice to his other children. He admits his son returned to Chariton at the time stated in the bill. At his return, he directed his son to settle on the land in controversy, letting him know, at the same time, that if he conducted himself in such a manner as to merit his approbation, he might finally give him the land. Upon this, his son went upon the land, and, with his assistance, made a small improvement upon it. He admits he made the assignment of the certificate mentioned in the bill, but denies it was thereby intended to convey him any right. The object in making the assignment was, to enable the son to obtain the patent, who was then about to go to the land-office, it being the opinion of them both, that without some written authority the officer would not deliver the patent to any other person than him who entered the land: that shortly after this he became offended with his son, ordered him from the land, letting him know at the same time he would not convey it to him, and demanded the certificate; that his son demanded a deed,

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which he refused to give him. His son then left the land, and did not return to it for some time: his son afterwards offered to purchase the land; the respondent refused to sell: that his son never pretended to claim the land under and by virtue of the assignment of the certificate, until a short time since; that his son has acknowledged that he had no claim to the land.

Hart denies that he purchased with notice of the complainant's claim; that he never heard that the complainant claimed the land before he purchased, and at that time he had no notice of the complainant's right, and maintains that he is an innocent purchaser for a valuable consideration, without notice of any conflicting claims.

Parks does not deny but that he purchased with notice of the claim of the complainant. It was proved, on the hearing, that the defendant, Joseph Halsa, acknowledged to one witness that he had assigned the certificate to his son. By another, it was proved that he had said he had given to his son the land in dispute, and other property, in consideration of his son removing from Livingston and settling in his neighborhood. Another witness testified, that the defendant, Joseph Halsa, told him that he had given, or would give, the land to his son, and for that reason refused to sell it to the witness; that the complainant went upon the land in the year 1835, and improved it by building a cabin and clearing from six to ten acres, which before was wild and without improvement, and during that year raised a crop of tobacco, and built a tobacco barn partly on the land. The complainant raised another crop of tobacco, and the year afterwards removed his cabin from the land, and put it on an adjoining tract. In 1837 complainant hired himself out to labor, and did not cultivate the land, which was done by some of the children of the defendant, Joseph Halsa. In the Fall of 1837 the complainant went to Florida, and returned in the winter, and went on the land, where he has since resided. Witness also testified, that both the defendants, Hart and Parks, lived in the neighborhood of the complainant, Hart within one mile, since the Spring of 1840.

On the hearing, the court dismissed the bill, from which the complainant has appealed to this Court.

Two questions arise on the record. The first is, whether the complainant has any interest in the land in controversy?—the second, whether, if he had, is the defendant, Parks, in such a condition, or has he shown that he is a purchaser of such a character, that a court of equity will not lend its assistance against him?

We cannot see on what ground it can be urged that the assignment of the certificate did not, so far as Halsa, the father, was concerned, pass an equity to the complainant. It was a sufficient note or memorandum to take the transaction out of the operation of the statute of frauds. This point has been long since settled by this Court, in the case of *Bean and Others vs. Vallé and Others*. (2 Miss. Rep., 126.) There it was held, that the word, "transferred," endorsed on the certificate, and signed by the holder thereof, passed an equity to the assignees. There is nothing that supports the pretence of the father, that the assignment was made to enable the son to obtain the patent from the office, that he might bring it home to him. It is strange, if the son was only to bring him

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home his patent, that the assignment should be written in such language as would authorize the issuance of a patent in the name of the son. If, as he says, he believed that a written order was necessary to empower the son to receive it from the officer, it is not pretended that he thought the order should have been so written as to require the government to issue the patent in the name of the son. Another circumstance is conclusive on this head, independent of the direct evidence of the witnesses. The certificate was delivered to the son, and he continued in the uninterrupted possession of it for a considerable time, and a demand for it was never made, nor did a thought of returning it ever occur, until the difficulty between Joseph Halsa, the defendant, and his son, or, as he expresses it, until he became offended with him. Such pretences, put forth in a defence, so far from aiding the cause of the respondent, serve only to detract from the weight the law allows an answer.

Was the assignment supported by a valuable consideration? It does seem it is only necessary to state the proposition in order to answer it. On what ground can it be maintained, that the removal of a young man a considerable distance, who is married and house-keeping, is not a sufficient consideration to support a conveyance for eighty acres of unimproved land? Those who have experience in such matters know that the trouble, inconvenience, and expense of breaking up and removing are not inconsiderable; indeed, it has become a proverb among us, that two removes are as bad as one fire. It may be said, the removal of the son was no benefit to the father, aside from the pleasure and gratification that would arise to a parent from the society of his children. It would not, perhaps, be a benefit to the father greater than as stated; but a benefit or advantage to the grantor is not the test of the value of a consideration. Inconvenience, trouble, or expense borne by the grantee will make the consideration as valuable in law as benefits conferred on the grantor.—*Allison vs. Singleton*, *Littell's Select Cases*, 30.

If the consideration was valuable, it may be objected, it was necessary to express it in the assignment of the certificate, and not being so expressed, the agreement was not binding under the statute of frauds. This was the law, as declared in England in the case of *Wain vs. Walters*; (5 East;) but in the case before referred to, of *Bean et al. vs. Vallé et al.*, this question underwent an elaborate argument, and this Court came to the conclusion, that a correct construction of the statute of frauds did not require that the consideration should be expressed in the note, memorandum, or agreement, concerning a sale or transfer of lands, or an interest in them.

If, then, the complainant was a purchaser for a valuable consideration, of an equity in the land in controversy, is the defendant, Parks, in such a situation with regard to the title to this land, that a court of equity will not lend its assistance against him? We will here premise that neither the defendant, Parks, nor Hart, claims in his answer any protection, or any advantage under the statute concerning the recording of conveyances; indeed, so far from seeking any assistance from that statute, it does not appear that either of their deeds have been recorded. This being the fact, this cause will be determined as though that statute was not in existence. It is one wholly without its provisions. The

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controversy will turn on the question, whether Hart is a *bona fide* purchaser for a valuable consideration, without notice of the equity of the complainant? There is no doubt of the correctness of the proposition, that a purchaser without notice from one who has fraudulently purchased is not affected by the fraud; and a purchaser with notice to himself from one who purchased without notice, may protect himself under the first purchaser. (*Bumper vs. Platner*, 1 Johns. Chan. Rep., 213.) Parks claims as a vendee under a purchaser without notice. The transaction amongst all the defendants is very suspicious, and it has much the appearance of a conspiracy to defraud the complainant. It was known that Parks could be affected with notice of the complainant's equity. It appears he was anxious to purchase the land, but he was not so bold as to have a conveyance made directly to himself; he looks around for one who, he supposes, had no notice of the right of the complainant, and that individual, he imagines, he found in the defendant, Hart. Halsa, the father, then sells to Hart, on the 18th of January, for three hundred dollars, and only four days thereafter, on the 22d of the same month, Hart conveys to Parks for three hundred dollars. So, if the consideration of the two deeds is truly stated, Hart did not make as much by his speculation as paid the fee for an acknowledgement of his deed, and the rent of the land four days in the month of January was not, we may well presume, worth a great deal. Why did Hart have anything to do with this transaction? No sufficient motive for his conduct appears from the proceedings in this cause, but a desire to assist Halsa and Parks to defraud the complainant. Parks does not deny but that he had notice of the right of the complainant, or if he did deny it, the evidence in this cause contains an ample refutation of his denial. But he claims under Hart, who had no such notice, and who is represented as a *bona fide* purchaser, for a valuable consideration, without notice. Let it be borne in mind that Hart, in his answer, only asserts that he is an innocent purchaser, without notice of any conflicting claims. He does not pretend that the purchase money was paid, nor does he deny any facts and circumstances from which notice may be inferred. He does not deign to tell us why he purchased on the 18th, and afterwards, on the 22d of the same month, sold for the price which he paid for the land. He cannot pretend dissatisfaction with his purchase, for he must have known the land, having lived within a very inconsiderable distance of it for some time. He does not, nor, it is presumed, he cannot, deny notice of the possession of the complainant. See *Bartlett vs. Glasscock*, (4 Mo. Rep., 67.) He does not explain how it was that he told a witness Halsa, the father, was about to get five or six acres of the land for him to cultivate. All these matters are unexplained, and there is a general assertion in his answer, that he is an innocent purchaser without notice. It is imagined that a party who relies on the defence of a *bona fide* purchaser without notice, must show something more than these defendants have done. In the case of *Frost vs. Beckman*, (1 Johns. C. Rep., 288,) it was held, that a party claiming relief in equity as a *bona fide* purchaser, must deny notice, although it is not charged. In *Geraud vs. Sanders*, (2 Ves., jun., 454,) the defendant pleaded a purchase for a valuable consideration without notice, and it was held that he was bound to deny fully, and in the most precise terms, every circumstance from

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whence notice could be inferred. So, in the case of *Denning vs. Smith*, (3 Johns. C. Rep., 345,) Chancellor Kent says, if a purchaser wishes to rest his claim on the fact of being an innocent *bona fide* purchaser, he must deny notice, even though it be not charged; he must deny it positively, not evasively; he must deny fully, and in the most precise terms, every circumstance from which notice could be inferred.

In the case of *Jewett vs. Palmer*, (7 Johns. C. Rep., 65,) it was held, that to support the plea of a *bona fide* purchase without notice, the party must not only aver and prove that he had no notice of the rights of the other party, but that he actually paid the purchase money before any such notice. It is not sufficient that he has merely secured the purchase money. The Supreme Court of the United States, in the case of *Wormly vs. Wormly*, (8 Wheat., 421,) says, it is a settled rule in equity, that a purchaser without notice, to be entitled to protection, must not only be so at the time of the contract or conveyance, but at the time of the payment of the purchase money. In another work of great authority it is said, a plea of a purchase for a valuable consideration, without notice, must be with the money actually paid, or else, according to Lord Hardwick, you are not hurt. The averment must not only be that the purchaser had no notice at or before the execution of the deeds, but that the consideration was actually paid before notice. Even if the purchase money be secured to be paid, yet, if it be not in fact paid, the plea of a purchase for a valuable consideration will be overruled.—Fonb. Equity, 444.

It appears, from these principles so well established in courts of chancery, that the defence of the defendants has no existence in equity; they have failed entirely to sustain themselves on the grounds on which they have rested. The decree of the court below is therefore reversed; and this Court, proceeding to enter such decree as should have been entered by the court below, doth order, adjudge, and decree, that all the right, title, claim, and interest of Peterson Parks, aforesaid, in and to the west half of the south-west quarter of section twenty-two, in township fifty-three, and range eighteen, containing eighty acres of land, do rest in Amos Halsa, aforesaid, and his heirs forever; and that the defendants pay all costs of this suit, as well in this Court, as in the court below.

AUSTIN vs. FELAND, GRAVES AND GRAVES.

Petition in debt against A., B., and C., on a note assigned to plaintiff by one W.—The defendants pleaded jointly *nil debit*. A. and B. pleaded, also, by way of set-off, that W., the assignee of plaintiff, was, before and at the commencement of the suit, indebted to said A. by note, in a certain sum, and that said W. was also indebted to said B. in a certain sum, to be paid in notes and accounts. Held: That the plea was good, because—

1. That whether at common law defendants in actions *ex contractu* could plead separately or not, the act of February 13, 1839, regulating practice at law, permitting plaintiffs at will to join

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- as many defendants in actions *ex contractu* as they please, certainly gives to defendants the right to plead separately.
2. That it was not necessary to aver, in the plea of set-off, that the debt mentioned was due at the time of the assignment of the note.
 3. That it is a general rule that where *indebitatus assumpsit* will lie on a simple contract, the debt due by such contract may be plead as a set-off; therefore the notes and accounts mentioned in the plea were subjects of set-off.
 4. That one of two defendants in an action *ex contractu* may set off a demand due him by the plaintiff; therefore A. and B. were properly permitted to set off demands due them separately from the assignee of the plaintiff.

ERROR to the Randolph Circuit Court.

DAVIS, for Plaintiff in Error.

The plaintiff insists that the plea of set-off is bad, and that upon the demurrer the judgment should have been for him.

The plea avers that one of the notes on Wear, the assignor, to plaintiff, of the note sued on, was to be paid in *notes and accounts*.—5 Mon., 83. The plea does not show that the demand offered to be off-set was due and owing to Wear before and at the trial of the assignment of this note to plaintiff.

The Circuit Court ought to have given the instruction of plaintiff, and it ought not to have given the instruction of defendants.—4 Mo. Rep., 233.

Damages cannot be set-off under the act.—2 Johns. Rep., 150, *Gordon vs. Bourne*.

Must be due in the same right.—See *Chitty on Contracts*, 328, 329; 11 Mass. Rep., 140, *Walker vs. Leighton et al.*; 4 Rand. Rep., 359, *Parton vs. Neckerois*.

SCOTT, Judge, delivered the opinion of the Court.

This was an action, commenced by petition in debt, on a note executed by the defendants, and made payable to William Wear, and by him assigned to the plaintiff, Austin.

The defendants pleaded jointly *nil debit*; J. H. Graves and Robert Graves pleaded, by way of set-off, that William Wear, the assignor of the plaintiff, was, before and at the commencement of the suit, indebted to J. H. Graves, one of the defendants, by note, in the sum of seventy-five dollars; and that the said William Wear was indebted to Robert Graves, another of the said defendants, in the sum of one hundred and seventy-seven dollars, to be paid in notes and accounts. To this plea the plaintiff demurred, and the court overruled the demurrer, and thereupon the parties went to trial, and the jury, to use their own language, found as in case of a non-suit. A motion for a new trial was made by the plaintiff and overruled, and he has brought his case here by writ of error.

It is contended by the plaintiff, that the defendants could not plead separately; that this being an action *ex contractu*, all the defendants should join in a plea in

bar. There are respectable authorities for the position that defendants pleading to the merits, in an action *ex contractu*, should join. (6 Mass. Rep., 444.) But others are against it. (*Moravia vs. Hunter and Glass*, 2 Maule and Selwyn, and *Minor et al. vs. The Mechanics' Bank of Alexandria*, 1 Peters' Rep., Comyns' Digest, title, "Pleader," 35.) However this question might be at common law, it would seem that the act of assembly of February 13, 1839, permitting plaintiffs at will to join as many defendants in actions *ex contractu* as they please, and to recover against one or more of them, had changed the law, had it been otherwise. In all actions of tort it was never questioned but the plaintiff could join several, and recover against one or more of them; hence it was always held that, in such actions, defendants could sever in their pleas. *Ubi eadem ratio, ibi eadem lex.*

It was next objected, that the demurrer to the plea of set-off should have been sustained, because it was not averred in the plea; that the debt mentioned in it was due at the time of the assignment of the note. We do not see the ground on which this objection is based. There is no doubt of the general principle that a set-off should be due and owing to the party by whom it is plead at the commencement of the action. (Chitty's Plead., 604.) Our statute prescribes, that the nature of the defence of the obligor, or maker, shall not be changed by the assignment, but he may make the same defence against the bond or note in the hands of the assignee that he might have made against the assignor, and that the obligor, or maker, shall be allowed every just set-off and discount against the assignor before the assignment. This was *debitum in presenti solvendum in futuro*. Whether it could be used as a set-off would depend on the plaintiff; if he brought his action against the maker or his assignee before it was due, it is clear it could not have been used as a set-off; but delaying his action until it was due, the defendant's right to employ it as a set-off was unquestionable.

Another point in the cause is, that one of the debts pleaded as a set-off was payable in notes or accounts, and therefore could not be used as a set-off. It is a general rule that where *indebitatus assumpsit* will lie on a simple contract, the debt due by such contract may be plead as a set-off. A set-off is never admitted in actions *ex contractu*, if the claim be for uncertain unliquidated damages. (Chitty, 604.) In the case of *Colson vs. Welsh*, Esp. Nisi Prius, Lord Kenyon held the statute of set-off applied only to mutual debts; that when the plaintiff's demand was on a special agreement a set-off was never allowed, although it might be when the plaintiff had recourse to the money counts. Debts may be set-off where *indebitatus assumpsit* will lie. (Coup., 56; 6 Tenn., 488; 2 Burr, 1024.) An action of debt would lie for goods and chattels by the common law. (*Wherewood vs. Shaw*, Selverton, 25.) In the case of the *Earl of Falmouth vs. Penrose*, 13 Eng. Com. Rep., 205, it was held, that *indebitatus assumpsit* would lie for goods and chattels. In that case, the declaration alleged that the defendants were indebted to the plaintiff in divers, to wit, one hundred fish of the value of £10. Our statute gives an action by petition in debt, on notes for the payment of money or property. If, then, debt, or *indebitatus assumpsit*, would lie on the note set out in the defendants' plea, it would follow, therefore, that it could be used as a set-off.— See 7 Weir, 311.

Austin vs. Feland, Graves and Graves.

A fourth objection is, that the defendants being sued jointly, they were permitted to set-off demands due them separately, from the assignor of the plaintiff. There are authorities for the position that one of two defendants may set-off a demand due him by the plaintiff. (12 Serg. and Rawle, *Stewart vs. Coulter*.) If there is any objection to this, it must be technical. It is because it is a matter not between the plaintiff and all the defendants. If a plaintiff sues two in debt, one of them may plead payment, or a tender with his own money, and thereby defeat a recovery. Why, then, if he will take his own debt, and set it off against the plaintiff, and thus defeat his action, may it not be done? There is no solid distinction between the case of a payment with his own money by one defendant, and pleading a set-off due him alone. The case would be different if the demand was due two defendants, and one of them was not sued, or, if sued, would not join in the plea. So, if in the case before the Court the debt offered to be set-off was due by the plaintiff and another, it would not have been allowed. If we follow the English cases too closely, they will lead us astray. If we will give the statute of set-offs such a construction as will prevent the payment of one man's debt with the debt of another, without his consent, the law will be satisfied. We must bear in mind that all joint contracts and promises, by our statute, are joint and several; and that our mode of doing business, by taking security to notes and bonds, may create a necessity for a departure from the English authorities. The right of set-off in many cases is a right of great importance, and is essential in order to do justice between the parties, and to prevent one from getting an advantage over another, which justice forbids. Courts will ascertain who is the real creditor, and who is really the debtor. If a plaintiff sues a defendant, and the defendant holds a note on the plaintiff, in which the plaintiff alone is principal and another is security,—if these facts appeared in a plea of set-off, it would be hard to resist the justice of such a demand. So, if a defendant were sued on a note to which there was security, even if the surety was not joined in the action, where would be the impropriety of allowing the defendant to use a set-off he might have against the plaintiff?

There were some irregularities in the progress of this cause in the court below, but they were of such a character as not to effect its merits, and of which the plaintiff cannot complain. When the demurrer to the plea of set-off was overruled, the court should have entered final judgment on the demurrer, as the plaintiff did not ask leave to withdraw it, and take issue on the plea. The plea of set-off standing admitted on the record, was a bar to the plaintiff's action, and there was no necessity for a trial of the issue on the plea of *nil debit*. As to the permission given by the court to the defendants, to mend their plea, we cannot see how the plaintiff was injuriously affected by it. It was a matter of form, and such amendments, in affirmance of judgments, may be made at any time.

Judgment affirmed.

BLAIR *vs.* STATE BANK OF ILLINOIS.

The parties to a suit may agree on the facts of the case, and suffer the court to declare the law arising on those facts. But they will not be allowed to agree on facts not in the cause, and thus obtain the opinion of the court on matters wholly disconnected with the suit.

APPEAL from the St. Louis Court of Common Pleas.

BLAIR and GANTT, *for Appellant.*

1. That, as assignee of H. H. Raisin & Co., he was vested with the same authority over the property and effects assigned which R. & Co. had possessed before the assignment.

2. That it was his duty, to the assignors and creditors, to make those effects as available to the extinguishment of debt as circumstances would permit.

3. That the assignors would unquestionably, under the circumstances, if reinstated in their effects, have availed themselves of the Bank and the depreciation of her notes, to pay their liabilities to her in her own paper, which had become cheaper than money.

4. That the fact that the creditors will not receive full payment does not appear in the case, and would not effect the argument if it did.

5. That, by the second section of the act of the general assembly of the State of Illinois, approved January 31, 1840, it is provided, that "The State Bank of Illinois shall, at all times, receive its own bank-bills in payment of any demand, debt, or claim due to the Bank from any individual or corporation whatever."

6. That the dividend made by defendant comes within the meaning of that section.

7. That, without such a provision in the law of the institution, the debt of the defendant to her was subject to be set off by her notes, under the general law.—See *Jefferson County Bank vs. Chapman*, 19 Johns. Rep., 322.

8. That, in this action, the court cannot consider the conduct of defendant as trustee, determine the extent of, or pass upon the manner in which he has exercised his powers, under the deed of assignment; his individual indebtedness to the Bank, on a dividend declared, an account stated, being the only subject before the court, and whether he has paid off the debt the only point to be determined.

BOGGS and HUNTON, *for Appellee.*

By the provisions of the charter of the Bank of Illinois, the debtor has the privilege of paying in the ordinary manner, *or* in notes of that institution. Does this election extend to his assignee?—first, upon general principles; second, as to the individual case.

1. The election is a personal privilege of the debtor. As in the analagous cases of infancy, &c., he alone can claim the advantage of it; if extended to third persons, the right would not operate to the personal benefit of the debtor, but for their advantage. This was not intended by the charter. The provision was made for the benefit of the debtor himself, and not for his creditors, or their representatives.

In this case, the assignors being wholly insolvent, as appears by their deed of assignment, the exercise of this privilege by the assignee would be simply for the benefit of the other creditors of the assignors.

2. The deed of assignment itself furnishes the guide, and marks out the duty of the trustee. As he can claim the exercise of no authority or power not there given, so a reasonable compliance with its provisions and directions furnishes him, in all things, an ample protection. The specific object for which the assets are placed in his hands is there clearly and distinctly designated.

He is to pay certain creditors, and the assignment itself is, in effect, a payment of the funds accordingly. The assignors, in the deed of assignment, did not save the right of electing to pay in the notes of the Bank of Illinois, and not having thus saved it, they have waived it, and the assignee has himself waived it by declaring a dividend in the usual manner upon the specific claim. The assignee seeks to pay the Bank in its own notes, not under the direction of the debtors, without any intimation from them, either in the deed or elsewhere.

He is the trustee of the Bank, as the other creditors. Her interests should, by him, be as much consulted as the interests of other creditors. He is the mere creature of the deed; he must look to that as his letter of instructions. His right to pay in the notes of the Bank cannot be claimed independently of the will of the debtor.

The moment the dividend was declared by the trustee, the right to the funds vested in the Bank; if they had been set apart in a box or bag, she might have maintained trover for them.

Again, what is there to distinguish this case, in principle, from the ordinary one, where one of the creditors of the party making an assignment has his notes in circulation? An individual creditor is equally bound with the Bank, under the law of set-off, to receive his own notes in payment from his debtor. Will it be contended that Blair, the trustee, after having declared a dividend in favor of Archer, for example, who was a creditor of Raisin & Co., has the right to go into the market, and buy up the paper of Archer at a discount, and offer it to him in payment of a dividend so declared? Surely not.

We have not deemed it necessary to call the attention of the Court to the well-settled principle, that the trustee cannot speculate in the trust-funds; that he ought not to be allowed to change them; and that, by his operation in this case, his compensation—his per cent.—would be increased.

We have not been able to find any authorities directly bearing upon this case. We must rely upon general principles.

Blair vs. State Bank of Illinois.

Scott, Judge, delivered the opinion of the Court.

H. Raisin & Co. made an assignment of their effects, for the benefit of their creditors, to the appellant, Blair. The effects assigned were insufficient to pay all his debts. The appellee, the State Bank of Illinois, was the holder of two bills of exchange on Raisin & Co., the endorsers of which were preferred creditors under the assignment. Blair, the assignee, declared a dividend of the assets amongst the preferred creditors, of twenty-five per cent. upon their respective claims. The State Bank of Illinois having failed, its notes in circulation were forty-four per cent. below par. An action of assumpsit was instituted by the Bank against Blair. The declaration contained the common counts, and the parties having agreed upon the foregoing statement of facts, they made the right of the plaintiff to recover dependent on the solution of the question, whether Blair, the assignee, could buy the notes of the State Bank of Illinois, and with them pay the dividend due the Bank, carrying the profits arising from the transaction into the general fund, for distribution amongst the creditors at large. The court below rendered judgment for the Bank, from which Blair has appealed to this Court.

If Blair wished to know whether the notes of the Bank could have been used as a set-off to the action against him, we know of no other mode by which it could be ascertained, than by pleading them by way of set-off. But we cannot see the object in raising this question. Raisin & Co.'s effects were insufficient to pay all their debts. The agreed case admits, that the endorsers of the bills of exchange were preferred creditors under the assignment; that is, we suppose, were to have the debts for which they were liable paid before the other creditors. Now, if Blair should have purchased the paper of the Bank, and with it have paid her dividend under the assignment, and carried the profits into the trust fund, would not those profits have rightly belonged to the Bank, standing in the place of the preferred creditors? Twenty-five per cent. of the amount of the bills of exchange, converted into Bank paper at forty-four per cent. discount, would not have paid the bills, and until the Bank had been paid, at least in her own paper, she being a preferred creditor, a question as to the legality of the conversion of the funds into Bank-paper could not well arise between her and the other creditors,—that is, should not all the money, accruing under the assignment, be first applied to the satisfaction of the preferred creditors.

But be these matters as they may, we do not feel ourselves at liberty to entertain questions presented in the manner in which this is done. The parties to a suit at law or equity may agree on the facts of a case, and suffer the court to declare the law arising on those facts, but to agree on facts not in the cause, and under pretence of a suit at law, to obtain the opinion of this Court on matters wholly disconnected with the suit, cannot be tolerated. Here we are called upon, in an action of assumpsit, to declare the law governing the conduct of a trustee in the management of the trust-fund, a duty peculiarly the province of a court of equity, which, with unrestrained freedom, takes a whole transaction into consideration, from the beginning to the end, giving attention to every circumstance which can in any wise effect its opinion. The straight-laced proceedings of a court of law

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wholly disqualify it for a such task, and neither the consent nor the release of errors, nor any other act of the parties, can induce this Court to permit itself to be converted into one in which questions of law may be mooted, at the will of suitors.

Appeal dismissed.

MARKS vs. BANK OF MISSOURI.

1. An agreement by the holder of a bill of exchange, giving time to the acceptor, will not release the endorser, unless the agreement be made upon a sufficient consideration. To discharge a security, the contract must be such as will prevent the creditor from suing the principal debtor.
2. It is not necessary that a consideration should be adequate in point of value, in order to be sufficient. If the least benefit or advantage be received by the promisor from the promisee or a third person, or if the promisee sustain the least injury or detriment, it will constitute a sufficient consideration to render the agreement valid.
3. The Bank of Missouri, as holder of a bill of exchange, agreed with the acceptor to receive from him twenty per cent. on the amount of the bill every four months, and interest in advance until the bill should be fully paid, and that no suit should be brought against the holder or endorser if the payment should be made as agreed upon. In pursuance of this agreement, one payment was made by the holder, but no further payment was made. It was contended by the endorser, that the payment of the interest in advance was a good consideration for the agreement to give time to the holder, and consequently discharged the endorser. *Held:* That if the Bank had the right to receive the interest in advance, there was no sufficient consideration for the promise; and if the contract was usurious, it could not have availed the Bank, for the usurious interest might have been recovered after it was paid; that the contract did not prevent the Bank from suing, as the money might have been returned or tendered, and the contract would have thereby been rescinded.

APPEAL from St. Louis Court of Common Pleas.

GEYER and DAYTON, for Appellant.

1. There is no evidence of sufficient notice to the appellant, of the dishonor of the bill. The clerk of the Bank states, that he left a notice at the counting-room of the appellant, which he believed was made out by the notary in New Orleans, and forwarded by mail to St. Louis. But, upon being cross-examined, he admits that he never examined the notice, did not know its date or what it contained, or even whether it was signed by the notary.

There is no evidence whatever as to the form or substance of the paper left at the counting-room of the appellant. True, the clerk calls it a notice of protest, but, upon his own assumption, he gives it that name in perfect ignorance of its contents. It does not appear to have been opened or examined by any of the witnesses who have testified in the case, and for aught they know, and for aught

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that appears, was a blank piece of paper, or had relation to some other matter than the dishonor of the bill in question; or, though intended to be a notice of that fact, was entirely defective in substance.

The law, it is true, prescribes no particular form for the notice; yet it does require it to contain certain matters of substance; and the party seeking to charge an endorser must affirmatively prove that the notice complies with the law in this respect. The notice must explicitly state what the bill is, and that payment has been refused by the drawer; and the contents of the notice must be proved either by parole testimony, or by producing a copy made by the witness at the time of making or seeing the original.—*Vide* 3 Kent's Com., 107, 108; Chitty on Bills, 9th American edit., 550; Johnson *vs.* Haught [et al., 13 John's. Rep., 470; 9 Peters' Rep., 33; 21 Wendell's Rep., 10.

2. Had the notice been shown to be sufficient in point of substance, the service of it, as proved in this case, was not good.

It seems to have been merely left at the counting-room of the appellant. No fact is proved to justify this mode of service, and, in the absence of such proof, the service must be deemed insufficient.—*Vide* 3 Kent's Com., 106; Chitty on Bills, 9th American edit., 502; 6 Peters' Rep., 250; 10 Johns. Rep., 490.

3. The payment of interest in advance for four months from the maturity of the bill, upon the sum remaining due, after deducting the one-fifth paid, was a good consideration for the agreement to give that time, and the agreement, thus made, discharged the endorser. There being no pretence that the time was given with either his knowledge or consent.

As to what constitutes a good consideration for a contract, *vide* 2 Kent's Com., 463; Chitty on Contracts, 4th American edition, 29 *et seq.*; 2 Peters' Rep., 170; 8 Mass. Rep., 300; 1 Caine's Rep., 45.

As to the effect of giving time in such cases, *vide* 3 Kent's Com., 111, 112; Chitty on Bills, 9th American edit., 441 *et seq.*, and cases there cited; Me. Lemore *vs.* Powell, 12 Wheaton, 554; Shaw *vs.* Griffith, 7 Mass. Rep., 494; Planter's Bank *vs.* Selman, 2 Gill and Johns., 230.

BOWLIN and WOODRUFF, for Appellee.

Two questions are presented—

1. Whether the holder of a bill after protest, giving time without consideration, discharges the endorser?

2. Whether receiving partial payments, and interest, for the usual period of bank-loans in advance, by which the plaintiff merely forbore to sue the acceptor, is such a giving of time, upon valuable consideration, as discharges the endorser?

On both these propositions the appellee assumes the negative, and claims the rule of law to be, in such cases, "That the endorser to a bill is only discharged from liability when the holder, for a *valuable consideration*, upon an *agreement* which binds him from suing on it, *gives time*. That mere forbearance to sue, and receiving partial payments on the bill, never discharges the parties to it.

In support of this doctrine, the following cases are cited:—Law Library, vol. 1,

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p. 78 *et seq.*; also, p. 109 *et seq.*; Bingham's Rep., vol. 4, contained in Sergeant & Rawle's Select Cases, vol. 16, p. 127; Wheaton's Digest, vol. 2, p. 533; Wendell's Rep., vol. 5, p. 501 *et seq.*; Hammond's Digested Index, vol. 1, p. 188; Condensed U. S. Rep., vol. 6, p. 636; Chitty on Bills, p. 442 *et seq.*, and note 1.

Scott, Judge, delivered the opinion of the Court.

This was an action of assumpsit, brought by the appellee against the appellant, upon a bill of exchange drawn by J. W. Gibson, on John Riffin, and by him accepted, payable to the order of Holman and Axtell, at the Commercial Bank of New Orleans, endorsed by Holman and Axtell and by the appellant, for the accommodation of John Riffin, and discounted for him by the appellee.

On the trial of the cause, Riffin, the acceptor of the bill, being released, testified that before the maturity of the bill he made an assignment of his property for the benefit of his creditors; that the assignment contained provisions for the payment of the bill in suit by instalments, one of twenty per cent. on the amount of the bill at its maturity, and twenty per cent. every four months thereafter: that shortly after he informed the cashier of the bank of his assignment, and the provisions it contained for the payment of the bill in question, and asked the cashier to accede to the arrangements for the payment of the bill made in the assignment.

This he understood the cashier to agree to. The cashier further said, that the bill should be returned to the plaintiff at maturity, and held for payment as before stated; that the bill was returned to the plaintiff at maturity, and witness immediately paid her one-fifth of the face of the bill, and interest in advance on the balance for four months from the maturity of the bill, and agreed to pay the plaintiff one-fifth, or twenty per cent. on the amount due in said bill, every four months thereafter, until the bill should be fully paid, and at the time of each payment, interest in advance was to be paid by the witness for four months on the balance. This arrangement was made by the cashier of the bank, who at the same time agreed that no suit should be brought against the endorsers of the bill, or against witness, if the future instalments and interest should be paid as agreed upon; and that if he, witness, thus paid them, he should have the requisite time. No further payment was ever made upon the bill. The defendant endorsed the bill solely for the accommodation of the witness.

The court, on the trial, gave the jury the following instruction, amongst others, which was excepted to, viz.: if they believe the Bank accepted 20 per cent. of the bill from Riffin, together with four months' interest, in advance, on the balance, and also that the Bank, upon the understanding that such payment of twenty per cent., and interest in advance, should be repeated every four months, forbore to sue the acceptor, this does not constitute such a giving of time as will discharge the defendant.

There was a verdict and judgment for the plaintiff, and the court refusing a new trial, this cause is brought here by the defendant, Marks.

There can be no doubt of the correctness of the proposition made by the appellee, that an agreement, giving an acceptor time, without the consent of the

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endorser, in order to release the endorser, must be upon a sufficient consideration. To discharge a surety, the contract must be such as will prevent the creditor from suing the principal debtor. It is unnecessary that the consideration should be adequate in point of actual value, the law having no means to decide upon this matter. If the least benefit or advantage be received by the promisor from the promisee, or a third person, or if the promisee sustain any, the least injury or detriment, it will constitute a sufficient consideration to render the agreement valid. It was held at this term of the Court, in the case of *Turner vs. Crigler*, that the executing a new note by the maker to an assignee as the payee, was a sufficient consideration to support a promise by the assignee to the maker, as he was thereby relieved from the trouble and inconvenience of proving the assignment in an action on the note.

But, from the view we take of this subject, the decision of this question is not material. Either the Bank had or it had not the right by law to receive interest in advance. If that right was conferred by law, then the payment of interest in advance was no consideration for the promise. If the Bank had not the right to take interest in advance, then the payment of it, in consideration of forbearance to sue, was usurious. (*Chitty on Bills*, 102.) If the contract was usurious, then, so far as the excess of lawful interest was concerned, it was of no avail to the Bank, for it might have been recovered the next moment after it was paid. Such a contract did not prevent the Bank from suing, as the money might have been returned or tendered, and the contract would have thereby been rescinded.

As to the point made relative to the sufficiency of the notice to the defendant of the dishonor of the bill, no question was made in the court below in regard to the sufficiency of the evidence, and it cannot be noticed in this Court.

Judgment affirmed.

TOMPKINS, Judge.—(Separate opinion.)

The Bank brought suit against Marks in assumpsit. The first count is special, on a bill of exchange made by one John W. Gibson, on the 4th day of December, 1839, and also bearing that date, directed to one John Riffin, by which said Riffin is required to pay to the order of Holman & Axtell, at, &c., the sum of \$1680, for value received, four months after the date, &c. The bill came to the hands of Marks by endorsement, and he passed it to the Bank. Riffin accepted the bill.

There were several common counts, all for the same consideration.

The defendant, Marks, pleaded several pleas, in substance alleging that it was agreed by and between the said plaintiff, then the holder of the said bill, and said Riffin, the acceptor thereof, without the consent of the defendant, in consideration that the said John Riffin had made an assignment of his property and effects for the benefit of his creditors, and in said assignment had provided for the payment of the said bill of exchange to the plaintiff, in certain instalments, to wit, twenty per cent. on the amount of the said bill at the maturity thereof, and twenty per cent. every four months thereafter on the same sum due, until the same should be

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fully paid; that the said plaintiff should give the said acceptor time for the payment of said bill, in accordance with the provisions of the said assignment, and the said bill should, after the maturity thereof, be returned to, and retained by, said plaintiff, &c.

The plaintiff denied the plea. Verdict and judgment were given for the plaintiff. The defendant moved for a new trial, and, his motion being overruled, he appealed to this Court.

John Riffin, the acceptor of the bill sued on, being first released by the defendant, was produced as a witness. He stated, that some time in March, 1840, and previous to the maturity of the bill, he made an assignment of all his property and effects to trustees, for the benefit of his creditors; that the assignment contained provisions for the payment of this bill, in instalments of twenty per cent. on the amount of the bill, at its maturity, and twenty per cent. every four months thereafter on the sum due on said bill till it should be paid; that shortly after, he informed the cashier of the plaintiff of his agreement, and the provisions contained in it for the payment of the bill in question, and asked the cashier to give him time for the payment of the bill as mentioned in the assignment. This he understood the cashier to agree to. The cashier further said that the bill should be returned to the plaintiff at maturity, and witness immediately paid the plaintiff one-fifth of the face of the bill, \$336, and interest in advance on the balance for four months from the maturity of the bill, and agreed to pay the plaintiff one-fifth, or twenty per cent., on the amount due, every four months thereafter, until the bill should be paid, and at the time of each payment witness was to pay interest for four months, on the balance, in advance. This arrangement was made with the cashier of the Bank, who, at the same time, agreed that no suits should be instituted against the endorsers of the bill, or against witness, if the future instalments and interest should be paid as agreed upon, and that if he, witness, thus paid them, he should have the requisite time. No further payment was ever made upon the bill. The defendant endorsed the bill solely for the accommodation of the witness.

Henry Shoulds, the cashier of the plaintiff, produced the following extract from the minutes of the board of directors of the Bank, viz.: "Whereas Mr. John Riffin has made an assignment of all his property for the benefit of his creditors generally, and this Bank having good individual security on the paper now due and protested, be it resolved, that suit be not instituted against him at the ensuing term of court, provided, the interest of the Bank in said assignment is not injuriously affected thereby." The witness had examined the records of the board, and stated that this was the only extract that had relation to the matter, and that the above extract included the agreement made between Riffin and the Bank, to the fullest extent. Witness stated that, as far as he knows, no other arrangement or agreement was ever made by him or the Bank, in reference to this matter. Witness stated that Riffin paid one-fifth of the bill; did not recollect, but presumed he had paid interest in advance for four months from the maturity of the bill.

The court then instructed the jury as follows:—"It is a rule of law, that if the holder of a bill, by a binding agreement, contracts to give time to the acceptor, the

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endorser is thereby discharged. To make such an agreement binding, it is necessary that the holder should have received some consideration therefor. If the jury believe that the Bank of Missouri, for a consideration given to her by John Riggin, the acceptor of the bill, agreed, after the bill became due, to give him time for the payment thereof, the jury will find for the defendant. If the jury believe the Bank accepted 20 per cent. of the bill from Riggin, together with four months' interest on the balance in advance, and also that the Bank, upon the understanding that such payment of twenty per cent., and interest, in advance should be repeated every four months, forbore to sue the acceptor, this does not constitute such a giving of time as will discharge the defendant. If the jury believe that the Bank of Missouri made any agreement with Riggin by which she was, for any length of time, prevented from suing Riggin, they will find for the defendant."

Judgment being given for the plaintiff, the defendant moved for a new trial, for divers reasons.

Something was said also in the argument about the insufficiency of the notice of protest. No question about that appears to have been raised in the Circuit Court, and I will content myself with observing, that I am not sensible that the notice was insufficient, and that if it were otherwise, the defendant should first have objected to it in the court of original jurisdiction.

The 28th section of the act to charter the Bank provides, that "All bills, bonds, notes, and every contract or agreement on behalf of the company, shall be signed by the president, countersigned and attested by the cashier; and the funds of the company shall in nowise be held responsible for any contract or engagement whatever, unless the same shall be executed as aforesaid."

This contract to give time to the acceptor, in order to be binding on the Bank, ought to have been reduced to writing, and signed by the president, and countersigned and attested by the cashier. But Riggin, the acceptor, does not even pretend that he had any agreement with the Bank. He held some conversation with the cashier, and he understood the cashier to agree to give him time. It is difficult to believe that a merchant of the city of St. Louis could be ignorant that this contract ought to have been with the Bank, if it were intended to have any obligatory force. But it is contended that, notwithstanding the law, presumptions will arise against corporations. "There is no reason why its assent to, and acceptance of, grants and deeds beneficial to it, should not be inferred from its acts, as well as that the same inference should be drawn from the acts of individuals." (Angel and Ames, p. 136.) It would be indeed a violent presumption against the Bank, that it should be presumed to intend to give the acceptor time on a bill protested for non-payment. This could not, then, be presumed, because it is not beneficial to the Bank. There was nothing in the treaty proposed, either of benefit to the Bank, or of injury to the acceptor. The Bank had a right to the amount of the bill, and it was his duty to pay it, and when he paid a part only, that, in law, could be no consideration for further indulgence on the part of the Bank.

The judgment of the Court of Common Pleas ought, in my opinion, to be affirmed.

LEE AND OTHERS vs. TABOR AND WATSON, GARNISHEES OF AUSTIN.

The validity of a deed of assignment alleged to be fraudulent, may be tried in a court of law upon an issue made between an attaching creditor and the assignee, summoned as garnishee under the provisions of the law relating to attachments.

ERROR to the St. Louis Court of Common Pleas.

POLK and CARROLL, for Plaintiffs.

1. The allegation being that the deed was fraudulent, it was equally competent for a court of law or a court of equity to entertain it; the object being not to vary or contradict the deed, as such, but to *disprove* its legal existence, and rebut its operation.—3 Black. Com., 443; *Bright vs. Eynon*, 1 Burr, 396; *Pemberton vs. Steeples*, 6 Mo. Rep., 59; 3 Starkie's Ev., 1017, note L; *Ibid.*, 1015, 1016; *Ibid.*, 1294, note E.

2. One partner cannot make a general assignment of the partnership effects, so as to bind the other.—*Hughes vs. Ellison*, 5 Mo. Rep., 466.

3. The case decided in this Court, reported in the 7th volume of Missouri Reports, "*Van Winkle and Randall vs. McKee and Baum*," was the case of a *fiery facias*; and our statute on *executions* authorizes only "*debtors of the defendant*" to be summoned. This, on the other hand, is a case of original *attachment*.

4. The law of attachments, as it now stands in this State, by the act of February 13, 1839, expressly authorizes the creditor to sue by attachment, where an affidavit is made that there is good reason to believe that the defendant or debtor "has fraudulently conveyed, assigned," &c., "any of his property or effects, so as to defraud, hinder, or delay his creditors;" and how is the truth of this affidavit to be tried, (a thing also authorized to be done,) if a deed cannot be assailed for fraud?—See Laws of Missouri, 1838-9, chapter, "Attachment," sec. 1.

5. The seventh section of the act of 1835, on the subject of attachments, provides, not only that all persons may be summoned as garnishees who are named in the writ, and all others who are debtors of the defendant, but also, all "such as the plaintiff or his attorney shall direct," thereby designing, very obviously, to comprehend others beside *debtors*.—See Laws of Missouri, 1835, article 1, section 7, of the law to "provide for the recovery of debts by attachment;" so that it is not necessary that the garnishee should be a *debtor* of the defendant, in order to make him answerable under an attachment.

6. The proceedings under our attachment law are somewhat in the nature of proceedings in equity; inasmuch as the appeal, both on the part of the plaintiff and the garnishees, is to the conscience of the party.

Lee and Others vs. Tabor and Watson, Garnishees of Austin.

SPALDING and TIFFANY, for Defendants.

POINTS FOR DEFENDANTS IN ERROR:

1. The burden was on plaintiffs to prove effects in hands of garnishees, as they denied any, which they failed to do.—3 Mo. Rep., 88.

2. The deeds of assignment are not on the face of them fraudulent or void, and, therefore, the answers cannot be held as admitting indebtedness or effects.—3. Mo. Rep., 252.

3. Even were the deeds of assignment void as to creditors, from containing provisions contrary to public policy or law, yet the fund cannot be reached in this way, but only by bill in chancery.—7 Mo. Rep., 435, *Van Winkle et al. vs. McKee*.

Savage was dead when the attachment was brought, as the declaration shows. The deed of assignment was undoubtedly good as to Austin, the survivor, at any rate; and Savage's interest, he being dead, is not liable.

The denial of the answers says, that the deeds of assignment were illegal and void, and the burden was on the plaintiffs to show it.

SCOTT, J., delivered the opinion of the Court.

Tabor and Watson were summoned as garnishees in a suit commenced by attachment, against William J. Austin. In answer to interrogatories filed, Tabor and Watson, the garnishees, stated they had and have no property or effects of the defendant in their possession, and are not and were not indebted to them.

They also stated, that they were assignees under a deed of assignment made to them by Savage & Austin, (of which firm said Austin is the surviving partner,) for the benefit of their creditors, and admit that there are some effects in their hands, by virtue of said assignment.

They further state, that they are assignees under an assignment made to them by the defendant in the attachment, Austin, of his individual property and effects, for the benefits of his creditors.

To the answer of the garnishees, the plaintiffs filed replications, affirming that there were effects of the defendant, Austin, in the hands of the said garnishees, and that the said deed of assignment was fraudulent and void.

On the trial, the court discharged the garnishees, and the plaintiffs have sued out this writ of error.

It does not appear for what reason the court discharged the garnishees; it was not, as was alleged, for the want of evidence, for the record states, that without hearing any evidence the order for the discharge was made.

From what fell, upon the argument of this cause, we are warranted in presuming that the garnishees were discharged on the authority of the case of *Van Winkle vs. McKee*, 7 Mo. Rep., 435.

That case arose on the construction of the statute giving plaintiffs, in execution, a right to garnish the debtors of the defendant. The reasoning of the court in that case would certainly apply to this; and were the phraseology of the statute

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concerning attachments as circumscribed as that in relation to executions, we would feel no hesitation in pronouncing a like judgment. Although, in our opinion, the same principles are involved in the two cases, yet such is the breadth of the statute relative to attachments, that we feel ourselves restrained from an application of them to the case now under consideration.

Under the execution law, a garnishment is given against the debtors of the defendant in the execution. The statute concerning attachments, 1835, section 1; gives an original attachment against the lands, tenements, goods, moneys, effects, and credits of the debtor, in whosoever hands they may be. The seventh section directs, that all shall be summoned as garnishees who are named as such in the writ, and such others as the officer shall find in possession of money, goods, or effects of the defendant, not actually seized by the officer and debtors of the defendant, and also such as the plaintiff or his attorney shall direct.

The act of 13th February, 1839, gives an attachment against a debtor who has fraudulently conveyed or assigned any of his property or effects. There is an allegation, that the assignment in this cause mentioned is fraudulent and void. These provisions are sufficient to comprehend all persons whom the plaintiff will direct to be summoned as garnishees; and if summoned, and it is found that they have money, goods, effects, or credits in their hands belonging to the defendant, the law makes them subject to the satisfaction of the judgment obtained in the suit commenced by attachment.

Judgment reversed.

WATHEN vs. FARR.

Plaintiff sued defendant before a justice of the peace, charging him, in his account filed, with a liability for twenty-five dollars, on account of an accepted order. It appeared in evidence, that the defendant had sold to plaintiff, in payment of the order, an anvil, vice, and three hammers, but afterwards refused to deliver them, alleging that the drawer of the order had failed. *Held:* That the plaintiff could not recover, as his account was not a statement of his cause of action. He should have filed an account for the articles purchased.

APPEAL from St. Louis Court of Common Pleas.

BOGGS, for Appellant.

1. The bill of items filed in the case before the justice of the peace was sufficient to apprise the defendant of the nature of the claim against him.—*Sublette and Vasquez vs. Noland*, 5 Mo. Rep., 516, 519.

2. The bill of items filed in this case, like the common count for money had and received, can be supported by proof that defendant received money for the use of the plaintiff.—*Chitty on Contracts*, 475.

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3. The defendant, in receiving the order drawn on him in favor of the plaintiff, and delivering to him the goods, and afterwards withholding them, and charging the drawer with the amount of the order, made himself responsible to the plaintiff for money had and received to his, the plaintiff's use.

4. If the defendant received the amount of the order from the drawer, as it is fair to presume that he did, he is responsible to the plaintiff for money held and received to his use.

5. The defendant, in refusing to let the plaintiff see the order, when asked to do so, made himself responsible as acceptor.—Revised Code, 98; 6th section of the act concerning bills of exchange.

6. The testimony of Mr. Vonlin, in relation to the pass-book, was improperly rejected, for it was competent to prove that this was the usual mode of doing business among merchants.

7. Where, from the nature of the proceedings in a case, the defendant has notice that the plaintiff means to charge him with the possession of an instrument, no farther notice to produce it is necessary. The court, therefore, committed an error in sustaining defendant's objection to the testimony of Cannon in relation to the order.—5 Mo. Rep., 17, *Hart vs. Robinett*.

8. The doctrine of stoppage in transitu does not apply, as the suit is not for the goods, but for the order accepted by the defendant, and charged to the drawers.

HUDSON and HOLMES, for Appellee.

1. The court was right in excluding the evidence objected to, as not pertinent to the issue upon the bill of particulars, as well as that portion of the deposition which relates to a written order, for the reasons stated in the bill of exceptions. (*Greel. Ev.*, sec. 560, 88, 87.) The defendant is not sued for a breach of contract of sale, nor for a wrongful conversion of the goods; nor is he sued upon the order as an instrument. The facts that occurred in relation to a sale of goods are no evidence of a promise to pay money; nor is the order, because not accepted in writing. This order is either a negotiable instrument, or it is not. It cannot be valid as an instrument, because it was neither offered for acceptance nor accepted in writing. It is, then, a mere written request to Asa Farr, jun., to deliver the plaintiff twenty-five dollars, and charge that sum to their account. In answer to it, the defendant says, that he will deliver twenty-five dollars' worth of hardware to the plaintiff, the holder, and charge the amount to Roche & Guy, which is agreed to. This is the whole of the transaction between them. Roche & Guy are the persons to whom the credit is given—the actual purchasers. James Cannon is their agent to receive the goods, and carry them to their place of destination; and he is also the agent of Wathen. A delivery to Wathen, according to the order, is a delivery to the purchasers, Roche & Guy; and a delivery to Wathen's agent is a delivery to Wathen, subject, however, to the right of stoppage *in transitu*, until the goods have arrived at the plaintiff's warehouse, or some other contemplated final place of destination. It is manifest, then, that the plaintiff has no cause of action at all; for,

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2. The right of stoppage *in transitu* continues when the delivery is not directly to the vendee himself, but to his agent, to be carried to the vendee, until the goods arrive at the warehouse of the purchaser, or some place of destination substituted by the purchaser.—2 Black. Com., 448, note 16; 2 Wheaton's Selw. N. P., 446; Abbott on Shipp., 374, 5, note 2.

A delivery to an agent does not end the transit, unless no farther transportation, no other final destination, is contemplated. (*Ibid.*, 375, note 1.) In this case, the warehouse of the purchaser was that of Roche & Guy, but by the arrangement between the parties, that of the plaintiff was substituted for it.

3. The entry in the pass-book of Roche & Guy was rightly excluded, as it was not proved to be in the hand-writing of the defendant, or any of his clerks or agents, nor to have been entered by request of the defendant. The suppositions of the witness are not evidence, especially when it appears to the court that he had no means of knowing anything that would entitle his opinion or belief to the character of evidence. But, admitting that the pass-book ought to have been admitted, and that the goods were charged to Roche & Guy, it does not alter the case. The evidence it contains is not pertinent to the issue; it does not prove a promise to pay money to the plaintiff.

NAPTON, Judge, delivered the opinion of the Court.

Wathen sued Farr before a justice of the peace in St. Louis, and filed, as his cause of action, the following account:—

"Asa Farr to Ignatius Wathen, surviving partner of Ellis & Watlien, Dr. 1842.—September 22.—To amount assumed for an order drawn on you by Roche & Guy, \$25 00."

The plaintiff recovered a judgment before the justice for the twenty-five dollars, but, on appeal to the Court of Common Pleas, the plaintiff was non-suited.

Upon the trial, the facts upon which the plaintiff's claim was founded appeared to be as follows:—

Messrs. Ellis and Wathen, who were partners in farming and milling in the town of Cape Girardeau, employed one Cannon, who was witness for the plaintiff in the cause, and by whom most of the facts were proved, to sell a portion of their lumber in St. Louis. Cannon sold the lumber to Roche & Guy, and received in payment an order from them on the defendant for twenty-five dollars. This order was presented by the agent aforesaid, and Farr, the defendant, received the order, and agreed to give hardware to the amount of the sum. Accordingly, the agent of the plaintiff selected goods to the value of the order, which consisted of a vice, anvil, and three hammers. The goods were weighed and marked, and the defendant was requested to permit them to remain a few days in his store. About two days after, the agent again called on Farr to apologize for leaving the goods so long in his way; but he was told that they occasioned no inconvenience, and might remain until it was convenient to take them away. When the agent called the next time, he was informed by defendant that Roche & Guy had failed, and that he could not have the goods. It also

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appeared, that an advance on cash prices was charged by defendant for the goods, in consequence of being paid for in this way.

There was other testimony in the case, conducing to show that the defendant had given credit to Roche & Guy for the articles sold to plaintiff, but the testimony was excluded by the court.

The plaintiff was non-suited in the Common Pleas, moves to set it aside, which was refused, and brings the question, by appeal, to this Court.

There is some difficulty in deciding what degree of latitude was designed by the legislature to suitors in justices' courts, as to the forms of action. In actions founded on account, a bill of items is required to be filed with the justice; (R. C., p. 351, sec. 9;) and where an instrument of writing is the foundation of the action, the instrument must be filed. (Pp. 350, '1, '6.) In all cases the justice enters on his docket a brief statement of the nature of the plaintiff's demand, whether sounding in damages, or founded on contract; (Pp. 350-2;) and, finally, upon the appearance of the parties before the justice, the justice may, at the instance of the defendant, or of his own accord, require the plaintiff to make a brief verbal statement of the nature of his demand.—P. 354, sec. 8.

It would seem, from these provisions, that all form was dispensed with, and it was sufficient if the plaintiff, in some one of the modes pointed out by the act, gives the defendant an opportunity of ascertaining what it is to which he is summoned to answer.

Indeed, the usual mode of commencing actions before justices is, by filing an account, whether the liability has arisen from a wrong, or on a contract. And it is immaterial that the justice enters it on his docket as an action of assumpsit, when the proof on the trial shows it to be an action of trover or trespass; for in actions of tort, no statement of the cause of action is necessary on the part of the plaintiff, except such statement as, by the eighth section of the third article of the act, he may be required to make verbally on the trial.

In this case, if the plaintiff had filed an account for the anvil, vice, and three hammers, and the justice had entered it as an action of assumpsit, there can be no question but that, on the proof, he was entitled to recover, notwithstanding it was, in fact, an action of trover, and not assumpsit.

So, if the plaintiff had omitted any statement of his cause of action, and the justice had entered it on his docket, as by law he is directed, the plaintiff, on proof, was entitled to recover the value of the merchandize which the defendant sold and delivered to him, and afterwards converted to his own use.

But the plaintiff files his account, and in that account charges the defendant with a liability for twenty-five dollars on account of an accepted order from Messrs. Roche & Guy. The plaintiff appears to have mistaken, not merely the form of his action, but the real cause of action which he had, for, upon the proof, no liability for any accepted order was made out, though good and substantial ground of action was proved, growing out of the same transaction. Would it not be going further than the legislature ever contemplated, if a recovery in such cases were permitted? Is it not liable to mislead a defendant, and induce him to come prepared with proof on one subject, when the plaintiff means to hold him

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responsible for another and different matter? Here the defendant, summoned as he was to answer to a demand for twenty-five dollars, arising on his acceptance of an order from a mercantile house, might rest easy, and come prepared with proof to establish his non-acceptance of the order, and he might very well neglect any proof, if any such he had, tending to show that there was no sale of the anvil, vice, and hammers, or that there was no delivery, the plaintiff's account not giving him any information whatever that his demand grew out of such sale.

Upon the whole, then, we are of opinion that the non-suit was properly entered.

Judgment affirmed.

TOMPKINS, Judge.—The statement of the case being made by Judge Napton, I will only observe, that by the fourth clause of the first section of the second article of the act to establish justices' courts, the justice is required to make on his docket a brief statement of the nature of the plaintiff's demand; and that, to enable him to do this, the plaintiff is required, by the ninth section of the same article, to file a bill of items of his account; and that, unless this be done, the Circuit Court, on appeal, cannot carry into execution the sixteenth section of the eighth article of that act, which requires that the same cause of action, and no other, that was tried before the justice, shall be tried before the Circuit Court upon appeal.

Wathen, then, not having filed the items of his account, viz., the anvil, vice, and the three hammers, but having filed an account for the order of Roche & Guy on Farr, instead of the account for the vice, anvil, and hammers, which he had received for that order, the judgment of the Circuit court ought, in my opinion, to be affirmed.

SCOTT, Judge, absent from the bench.

LAMARQUE vs. LANGLAIS.

Under the act of December 23, 1815, (1 Territorial Laws, 422,) directing the mode of taking the acknowledgment or proof of deeds executed by non-residents, a notary public of another State was not one of the officers therein authorized to take the acknowledgment of a non-resident to a conveyance of lands situated in this State.

ERROR to Washington Circuit Court.

P. COLE, for Plaintiff in Error.

The only point in the case is, whether the Circuit Court erred or not in excluding the deed and certificates from the jury. The law that must govern the case will be found in Geyer's Digest, p. 128, 9, sec. 6.

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SCOTT and ZEIGLER, for defendant in Error.

Thère seems to be but one point worth notice in the case, viz.:—

Was the deed of the 9th September, 1820, by Pierre Leverard, alias Morton, and wife, to Bernard Pratte, sen., and Thomas F. Riddick, tendered in evidence by Lamarque as a *recorded deed*, under the certificates and proof offered to sustain and authorize its admission, properly rejected by the court.

The defendant in error contends it was properly rejected.

TOMPKINS, Judge, delivered the opinion of the Court.

John Langlais sued Etienne Lamarque in ejectment, and having obtained a judgment against him in the Circuit Court, Lamarque prosecutes his writ of error to reverse that judgment.

None of the evidence given by the plaintiff is preserved in the bill of exceptions; but the only point on which the defendant in the Circuit Court, appellant here, relies is, that the court rejected a deed, offered by him to show title out of the plaintiff, appellee. This deed, according to Mr. Scott's statement, (for I am not able to decipher the name as written by the clerk of the Circuit Court,) is made by Pierre Leverard, alias Martin. He and his wife convey to Bernard Pratte, sen., and Thomas F. Riddick, by deed dated the 9th September, 1820, and acknowledged before a notary public of Randolph county in the State of Illinois, and filed for record in the recorder's office in Washington county in this State, on the 25th day of October in the same year. The land is described as containing four hundred acres, &c., situated in the old mines in the county of Washington, &c., and is the tract granted to the said Pierre by concession from Don Carlos Dehault Delassus, lieutenant-governor of the province of Upper Louisiana, &c. For what reason this deed was refused to be received in evidence we are not able to collect from any points made by the counsel of Lamarque. He says, "The only point in the case is, whether the court erred in excluding the deed from the jury;" and adds, that the law will be found in Geyer's Digest, 128, 9. There it is found to be provided by statute, "that all deeds or conveyances of any lands or tenements within this territory, which shall be proved before any court of record, and certified under the seal of such court of record, and all such deeds and conveyances made by such person or persons, not residing in this territory, as shall be acknowledged before any mayor, chief magistrate, or other officer of any city, town, or place where such deeds are, or shall be made or executed, and certified under the common or public seal of such city, town, or place where they have a public seal, if not, under the private seal, &c., shall be as valid and effectual in law as if the same had been acknowledged or proved before any judge of the superior or circuit courts in this territory." This act was passed in December, 1815, and was the law of 1820 also. Its only effect was to impart notice to subsequent purchasers of the same land. But, by the ninth section of the act of 1st February, 1839, supplementary to an act concerning evidence, it is provided, that "any deed of conveyance duly acknowledged or proved, and recorded,

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according to any law in force at the time of such acknowledgment or proof, although not declared to be evidence, shall be received in evidence, if it shall appear to have been duly recorded in the proper office within one year from its date, or more than twenty years from the time it is offered in evidence. This deed has been shown to have been filed for record within less than one year from its date. Was it acknowledged before such person as the act requires? The act requires it to be proved or acknowledged, 1st, before a court of record, &c., or, 2d, any mayor, chief magistrate, or other officer of any city, town, or place where such deeds are, or shall be, made or executed, and certified under the common or public seal of such town, city, or place where they have a public seal, &c.

The act seems first to have selected judicial tribunals as the most proper to authenticate deeds; next, the chief executive officers of any town, city, or place: first it says, "before any mayor, chief magistrate, or other officer," meaning, certainly, other chief officer of any city, town, or place. If there were, under the laws of Illinois, any chief officer to assume the government or civil control over the county of Randolph, a question might arise, whether an acknowledgment of a deed before such an officer were not good? We know well that notaries public are not officers of that character; public policy might require the appointment of more than one, and neither of them would necessarily be connected with, or dependent on, the other; and his seal, therefore, could not be the seal of Randolph county.

The judgment of the Circuit Court is affirmed.

THE STATE vs. THE ST. LOUIS PERPETUAL MARINE, FIRE, AND LIFE,
INSURANCE COMPANY.

1. The third section of the act of February 25, 1843, entitled, "An act to repeal the charters of certain incorporated companies," declares, that "It is hereby made the special duty of the attorney-general of this State, to apply to the Supreme Court for a *quo warranto* against" certain insurance companies, &c. The attorney-general made application to the Supreme Court for said writ of *quo warranto*, as therein directed. The application was refused, on the ground, that the writ of *quo warranto* was a writ of right, and issued as a matter of course on demand of the proper officer.
2. It would seem that the general assembly confounded the proceedings on a writ of *quo warranto*, with those on an information in the nature of a *quo warranto*, by making it the duty of the attorney-general to apply to this Court for a writ of *quo warranto*.

SCOTT, Judge, delivered the opinion of the Court.

The State, by the attorney-general, filed a motion for a writ of *quo warranto*, against the St. Louis Perpetual Marine, Fire, and Life Insurance company, in order that proceedings might be thereupon had, in conformity with the provisions

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of an act entitled, "An act to repeal the charters of certain incorporated companies," approved February 24, 1843. The motion indicates that the attorney-general is aware of the difference between a *quo warranto* and an information in the nature of a *quo warranto*.

This Court, by the constitution of the State, has power to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, and other original remedial writs, and to hear and determine the same. It would seem that the general assembly confounded the proceedings on a writ of *quo warranto* with those on an information in the nature of a *quo warranto*, by making it the duty of the attorney-general to apply to this Court for a writ of *quo warranto*. A writ of *quo warranto* is in the nature of a writ of right for the State against any person who claims or exercises any office, to inquire by what authority he supports his claim, in order to determine the right. (3 Black. Com., 262.) The writ of *quo warranto*, in consequence of the length of its process, has long since become obsolete in the English law; and information in the nature of a *quo warranto*, wherein the process is speedier, has been substituted in its place.—Tomlin's Law Dic., title, "*Quo Warranto*."

The general assembly must have contemplated this last proceeding, in directing the attorney-general to apply to this Court for a writ of *quo warranto*. A writ of *quo warranto*, as we have seen, is in the nature of a writ of right; it issues on demand of the proper officer of the State, as a matter of course, and there is no more necessity for an application to this Court for this writ than there would be for a summons in a Circuit Court, when the State is about to commence an action of debt against one of her debtors. No reasons are offered why the writ should issue; no information is communicated by affidavit, or otherwise; and there is no power in this Court to refuse issuing the writ. Where, then, is the necessity of asking leave? The asking leave is the admission that this Court has a discretion in refusing or granting a writ of *quo warranto*, whereas none is conceived to exist.

In the case of the *State vs. Merry*, 3 Mo. Rep., it was held, that under that clause in the constitution which gave this Court original jurisdiction of writs of *quo warranto*, an information in the nature of a *quo warranto* might be filed, and that jurisdiction of it would be entertained. In the case of the *State vs. McBride*, 4 Mo. Rep., 302, an information in the nature of a *quo warranto* was exhibited against him, and jurisdiction was entertained of it by this Court. The question was not made in that case; the party, it is presumed, acquiescing in the opinion pronounced in the case of the *State vs. Merry*.

No question of jurisdiction can arise on the application now made by the attorney-general, as he has not thought proper to ask leave to file an information in the nature of a *quo warranto*, but a demand is made simply for the writ itself, which, we conceive, issues as a matter of course from the clerk's office of this Court, on demand of the proper officer.

Motion refused.

King vs. Bailey.

KING vs. BAILEY.

1. Possession of personal property by the mortgagor, after the mortgage, is not fraudulent and void in law, as against creditors, prior or subsequent.—See S. C., 6 Mo. Rep., 575; *Shepherd vs. Trigg*, 7 Mo. Rep., 151; *Ross vs. Crutsinger*, *Ibid.*, 245.
2. The act of February 11, 1835, entitled, "An act to prevent fraud," (Rev. Stat., 1835, p. 283, 284,) does not require that conveyances of goods and chattels, made for a valuable consideration, should be recorded. The act avoids conveyances of goods and chattels, for a consideration not deemed valuable in law, unless possession actually and *bona fide* accompany the conveyance or gift, or unless the same is acknowledged and recorded in the like manner as deeds for land.
3. In a suit by a mortgagee of personal property, against a purchaser of the mortgaged property, under execution against the mortgagor subsequent to the mortgage, the mortgagor is a competent witness for the mortgagee.
4. The bare possession of a chattel by a mortgagor, with the consent or permission of the mortgagee, and determinable at his will, is not the subject of sale under execution.

APPEAL from Crawford Circuit Court.

M. FRISSELL, for Appellant.

1. The writing upon which Bailey claimed possession is a mortgage. King at least had the rights of Hinton, the mortgagor, by virtue of his purchase at constable's sale, of the negro girl, as the property of Hinton.—Rec., p. 12; Secus in New York, *sed vide* Stat. of Mo. 1835, p. 409.
2. The court instructed the jury that Hinton, the mortgagor, was a competent witness.
3. That Hinton, an interested witness, was allowed to testify to the jury, notwithstanding the objections and exceptions of the defendant, King.
4. The court below refused to permit legal and competent testimony, in behalf of the defendants below, to go to the jury.

SCOTT, Judge, delivered the opinion of the Court.

Bailey brought an action of detinue against King, for a negro girl mortgaged to Bailey by Jacob Hinton. Hinton was indebted to King, and King sued out execution against him, by virtue of which the negro was levied on and sold, and King became the purchaser. The negro, at the time of the execution of the mortgage, was permitted to remain as a nurse with the wife of Hinton, who was a relation of Bailey, and had a large family of children.

On the trial, Bailey obtained a verdict and judgment.

On the part of King, it was endeavored to be shown, that the transaction between Bailey and Hinton was fraudulent against King, who was a creditor of Hinton, and several instructions, involving the law on that subject, were asked, all

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of which were given, except the following, namely, that if the jury believe, from the evidence, that after the execution of the mortgage of the slave, Joan, by Hinton to the plaintiff, that Hinton remained in possession of the said slave, then the mortgage of said slave is fraudulent and void, as regards the said defendant.

The court also refused the following instruction, that there was no evidence in the case that there was any bill of sale or other conveyance, transferring the slave in dispute from Hinton to Bailey, executed by Hinton, and duly recorded. The evidence on which this instruction was predicated was, the proof of the execution of the mortgage by Hinton at the trial, and the certificate of its being recorded by the clerk, though there was no evidence of its having been proved or acknowledged before any court or officer authorized to take the acknowledgment of deeds.

After the opinion of this Court, in the cases of *Shepherd vs. Trigg*, and *Ross vs. Crutzingle*, in the 7th vol. Miss. Reports, it need hardly be observed, that the court below committed no error in refusing the first instruction, first above set forth.

As regards the second of the said instructions, the law is equally clear. The statute for the prevention of frauds, (Rev. Code, 283,) does not require that conveyances of goods and chattels, made for a valuable consideration, should be recorded. It avoids conveyances or gifts of goods and chattels made for a consideration not deemed valuable in law, unless possession actually and *bona fide* accompanies the conveyance or gift, or unless the same is acknowledged and recorded in the like manner as deeds for lands. The assumption, that the mortgage was for a consideration not deemed valuable in law, was taking the matter in controversy for granted. It was for a valuable consideration, from aught to the contrary appearing to the court, and the instruction was, therefore, properly refused. It was certainly improper to read the certificate of the clerk, that the mortgage had been duly recorded, as it does not appear that it had ever been proved or acknowledged before it was recorded; but, as that testimony was wholly irrelevant, and not of a character to mislead the jury, and as we cannot see that such evidence could have influenced the verdict, the judgment will not be reversed on that ground.

It is objected, that the court erred in permitting Hinton to be examined as a witness for the plaintiff, Bailey. We cannot see what interest Hinton had that would disqualify him as a witness for Bailey. The case of *Bland vs. Ansley*, (2 New. Rep., 3 Starkie, 1355,) will show that Hinton was not a competent witness for King, for the effect of his evidence would have been to take Bailey's property to pay his own debt. Then, if he was liable over to both parties, his interest was equivoiced, and he was competent. But, in fact, he would not have been responsible to Bailey, had the negro been recovered by King, for such a recovery could only have been had on the supposition that the transaction between Hinton and Bailey was fraudulent; and such being the fact, no action would have arisen from it to Bailey against Hinton. (*Gardenier vs. Tubbs*, 21 Wend., 169.) Another point made by the appellant was, that the equity of redemption of Hinton was subject to execution, and King becoming the purchaser

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of the equity, he had a right to hold the slave until the equity of redemption was foreclosed by Bailey. The case of *McNair vs. O'Fallon and Others*, decided at this term of the Court, in which it was held, that an equity of redemption in lands might be sold under execution at law before the revised laws of 1825, stands upon considerations which do not affect this question. The eighteenth section of the execution laws declares, that the word levy, as used in that act, shall mean the actual seizure of the property by the officer charged with the execution.

The 43d section of the same act directs the officer, when the purchase money of any goods and chattels is paid, to deliver up to the purchaser such property. These injunctions of the law would be impracticable, if a mere equity of redemption, or the interest of a pledgor in goods or chattels, could be sold under execution. The bare possession of a chattel by a mortgagor with the consent or permission of the mortgagee, and determinable at his will, would not be the subject of sale under an execution. Permission that a chattel may remain with one is not a permission that it may with another. If one merely permits his slave to remain during pleasure with his neighbor, has the neighbor such an interest in the slave as can be sold under execution? Would the consent of the master, that his slave might remain with a particular person, be construed to mean that any one might have the possession of him who purchased under an execution? We do not intend to convey the idea, by anything said, that a certain and determined interest in chattels, accompanied with the possession, however limited it may be, cannot be sold under execution.

There is no doubt that, by the common law, the interest of a mortgagor, pledgor, or lessor of goods could not be seized and sold under execution. In *Bacon*, (vol. 2, title, "Execution," 715,) it is held, that the sheriff cannot take in execution goods pawned or gaged for debt, nor goods demised or letten for years, nor goods distrained.

Judgment affirmed.

TOMPKINS, J., dissenting.

CALDWELL, ADMINISTRATOR, vs. MCKEE.

Amendments are not allowed as a matter of course, by the statute, but are only permitted at the discretion of the Court, in furtherance of justice. The Supreme Court will not interfere with the exercise of a discretionary power vested in the Circuit Court, unless, perhaps, under peculiar circumstances.

ERROR to the Marion Circuit Court.

SCOTT, Judge, delivered the opinion of the Court.

This was an action commenced by attachment against Reddick McKee, by A. Caldwell, administrator. The declaration, affidavit, and bond were filed in Novem-

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ber, 1839, and the writ is tested on the 20th day of September of that year. Counterparts of the writ were sued out to several of the adjoining counties.

On the return of the writ, motions were made to dismiss the proceedings for irregularity. The plaintiff filed a cross motion to amend the writ, so as to make its teste correspond with the time of filing the declaration, affidavit, &c. The court overruled the motion to amend, and sustained that to dismiss the proceedings for irregularity, and the plaintiff has brought the cause here by writ of error.

This is a proceeding to have the discretion of the Circuit Court revised. Amendments are not allowed, as a matter of course, by the statute. They are permitted, in furtherance of justice, by a wise and liberal exercise of the discretion entrusted to the Circuit Courts. Those courts, in contemplation of law, are competent to the discharge of the duties entrusted to them. But, as they are numerous, for the sake of uniformity in the law, a tribunal is instituted to determine legal questions in the last resort. No good can result, nor will the cause of justice be advanced, by this Court blindly undertaking to revise the discretion of the Circuit Courts. In all questions of this kind, the opportunities offered the Circuit Courts for a wise exercise of their discretion, are greatly superior to those enjoyed by this Court. There is no one at all conversant with the administration of justice in our Circuit Courts, but knows that questions are daily addressed to their discretion, and determined by them, which it is impossible for this Court wisely to review, and that, in making such attempts, justice would often be confounded. In this case the party was not remediless: he might have commenced again. Had liens, subsequent to his suit, attached, that may have been a reason for refusing the amendment, as its allowance might have engendered litigation in relation to their priority, as questions would have arisen as to the effect of the amendment. Proceedings by attachments are *stricti juris*, and in such, amendments are not as liberally granted as in ordinary proceedings. In the case of *Long vs. Overton and Pickett*, (7 Miss. Rep., 568,) an amendment was not allowed to be made by the Circuit Court, and this Court refused to disturb its action. The cause of justice will not be promoted by encouraging parties to come to this Court on every question ruled against them in inferior courts. Those courts are not to be regarded as places in which causes are merely prepared for trial, to be ultimately determined in this Court.

Let it not be supposed that this Court is opposed to allowing amendments by the Circuit Courts, when they are made in furtherance of justice. A liberal and enlarged discretion, on all such applications, should be indulged. But when the discretion of the Circuit Court has been exercised, and this Court is called upon to revise it, it must be satisfied it is doing justice in disturbing its action.

Judgment affirmed.

Glasgow vs. Pratte.

GLASGOW vs. PRATTE.

1. Notice of the dishonor of a bill or note may be given by any party to the same.
2. Notice of non-payment may be either verbal or in writing.
3. Where the endorser, on the day the note became due, consented, on payment of half the amount of the note, that the maker might have another week to pay the balance due, it was held, that notice of non-payment of the balance at the end of the week was not necessary to fix the endorser.
4. Where a place of payment is designated in the body of the note or bill, a demand of payment at the place designated is necessary, in order to bind the endorser.

ERROR to the St. Louis Court of Common Pleas.

DARBY, for Plaintiff in Error.

The only point presented is, whether the defendant had notice of the non-payment of the note, by the makers. The evidence on this head is preserved in the bill of exceptions; wherein the defendant, who was present when the note fell due and was presented for payment, consented that the same might not be protested for non-payment, and consented to waive any protest at that time.—2 Chitty's Rep.; Chitty on Bills, 502, verbal notice sufficient; *Ibid.*, 446, 484, 467, showing that no new notice was required; 16 East.

BOGY and HUNTON, for Defendant in Error.

1. An express verbal agreement between all parties to a bill or note, that it shall not be put in suit till certain estates be sold, constitutes no excuse for not giving due notice.—Chitty on Bills, 466, 1 Holt, 550; or 3 Eng. Com. Law Rep., 185.
2. Whenever a party to a note is entitled to his remedy over against another party, either on the note or otherwise, as he may be prejudiced by the delay in giving him notice of the dishonor, he is, therefore, entitled to it.—Chitty on Bills, 470, 471; 8 Barnwell and Cresswell, 610, or 15 English Com. Law Rep., 314; 3 Barn. and Ald., 619; or 5 English Com. Law Rep., 401.
3. The death or known insolvency of the maker of a note constitutes no excuse, either in law or equity, for the neglect to give due notice of non-payment.—Chitty on Bills, 482, 483.
4. Knowledge of the dishonor is not sufficient excuse for the want of notice.—Chitty on Bills, 483, note 2.
5. The waiver of the endorser must be expressed, to do away with the laches of the holder.—Chitty on Bills, 540, and see note E.
6. A demand and notice in every case where a drawee exists, is an implied condition of the contract or endorsement.—9 Johns. Rep., 121, *Berry vs. Robinson*.
7. In this case, there is no proof that any demand was made of the maker, after

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the expiration of the further time given, and without proof of a demand of the maker, the holder cannot recover against the endorser.

SCOTT, Judge, delivered the opinion of the Court.

This was an action of assumpsit, on a promissory note made by Grimsley and Young, payable to Bernard Pratte, at the office of the Mutual Insurance Company of St. Louis, and by him endorsed to William Glasgow.

The action was by the endorsee, Glasgow, against the endorser, Pratte.

On the trial, it was proved by Young, one of the makers of the note, that on the day it became due, he went to the plaintiff and informed him, that he would not be able to pay more than half the amount of the note at that time, and asked for a week longer to pay the balance. The plaintiff said he had no objection to the indulgence asked, if the endorser would consent to it. Witness after saw the endorser, Pratte, on the same day, in the office of L. A. Benoist & Co., where the note was placed for collection; witness informed the endorser of the previous conversation with the plaintiff, and the defendant responded, that he had no objection to giving the makers a week longer to pay the other half of the note. Nothing was said about any further notice, one way or the other. Witness paid the plaintiff one-half the amount due on said note, on the day it became due, and the said note was not afterwards presented for payment, or protest for non-payment, nor was there any further notice given of the dishonor of the said note. Witness also testified that the makers of said note had paid other and larger debts subsequent to the time when the balance on this note became due.

The court, sitting as a jury, gave verdict and judgment for the defendant.

This cause was submitted to the court sitting as a jury, and as the court was not requested to declare the law on the facts, we are at a loss to determine the specific objection to the verdict and judgment. Had this cause been submitted to a jury, and no instructions asked by either party, and no law declared to the jury by the court, this Court would have been very loath to interfere.

We do not well see what solid distinction, in this respect, there is between the two modes of trial. In either case, this Court cannot well determine whether the objection is to the finding, as being against evidence, or whether it is to the application of the law to the facts. It would certainly have been better had it been understood, that when the parties waive a trial by jury, they waive also its incident—the right to apply for a new trial.

Whatever doubt may have been entertained on the subject, it seems now to be settled, that notice of the dishonor of a bill or note, given by any party to the bill, is sufficient. It is not sufficient, as has been sometimes holden, that the party suing should give the notice. It is sufficient if any party to the instrument give it. *Stafford vs. Yates*, (18 Johns. Rep., 327.) And notice of non-payment may be either verbal or in writing. (*Cuyler vs. Stephens*, 4 Wend., 566.) The case of *Foster vs. Jurdeson*, (16 East., 105,) is an authority to show, that notice of the non-payment of the note on which this suit was brought, at the end of the week

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for which indulgence was granted, was not necessary to fix the endorser, the first notice being sufficient for that purpose.

Admitting the notice given by Young to Pratte, of the non-payment of the note, was sufficient, and that no notice of the non-payment at the end of the week was necessary, yet was not a presentment for payment, at the place of payment named on it, necessary to bind the endorser? In the case of the *Bank of the United States vs. Smith*, (11 Wheaton,) the Supreme Court of the United States says, that, as against the maker or acceptor of a bill or note payable at a particular place, no averment, or proof of demand of payment at the place designated, would be necessary. But when recourse is had to the endorser of a note or bill, different considerations arise. He is not the original debtor, but only surety. His undertaking is not general, like that of a maker, but conditional, that, upon due diligence having been used against the maker, payment is not received, then the endorser becomes liable to pay. This due diligence is a condition precedent, and an indispensable part of the plaintiff's title and right of recovery against the endorser. And when, in the body of a note, a place of payment is designated, the endorser has a right to presume that the maker has provided funds at such place to pay the note, and has a right to require of the holder to apply for payment at such place. In *Bacchus vs. Shepherd*, (11 Wend.,) a stipulation by the endorser of the note, to waive notice of demand of payment, does not dispense with the demand itself. So, in the case of *Cruger vs. Armstrong*, (3 J. C., 5,) it was held, that if the drawer has no funds in the hands of a drawee, it is no excuse for not demanding payment, though it may excuse the want of notice to the drawer. A note may be paid at the place where payable, for the honor of the maker.

In the case of *Agan vs. McManus*, (11 Johns. Rep., 186,) it was held, that the doctrine as to the waiver of notice of the dishonor of bills of exchange does not apply to promissory notes.

In the case of *Gregory vs. Allen*, (1 Martin's and Yerger's Reports,) it was held, that in order to show a waiver of demand and notice by an endorser, clear and unequivocal evidence is required of such waiver. In the case of the *Union Bank vs. Magruder*, (7 Peters, 287,) whether certain facts, in reference to an alleged notice to the endorser and demand of payment of a promissory note by the drawer, amounted to a waiver of the objection to the want of demand and notice, is a question of fact, and not matter of law, for the consideration of the jury.

There is no evidence that Young, the witness and one of the makers of the note, was an agent for Glasgow, and it does not appear that the witness ever communicated to Glasgow the fact, that Pratte consented to the indulgence asked by Young. If Glasgow was wholly unapprized of Pratte's consent, it is hard to see with what propriety it can be said to be a waiver by Pratte of demand for payment, and the fact that he was not unwilling to the indulgence, if not communicated in an authorized manner to Glasgow, could no more be termed a waiver, than the mere existence of it in his breast, uncommunicated to any one. *De non apparentibus et non existentibus, eadem est ratio.*

We can see no reason for disturbing the judgment of the court below.

Judgment affirmed.

DECISIONS
OF THE
SUPREME COURT OF MISSOURI,
AT
JANUARY TERM, 1844.

WILLIAMS vs. VANMETER.

1. In an action for a malicious prosecution, in causing the plaintiff to be arrested as a vagrant, the warrant upon which the arrest was made did not sufficiently describe the offence. Yet, as it appeared that the warrant was intended to arrest the plaintiff, for the offence charged by the defendant, it was properly admitted in evidence.
2. Although an instruction may assert a correct legal principle, yet, if the same principle has been announced to the jury in other instructions, the court is not bound to give such instruction.
3. In an action for malicious prosecution, the bare acquittal of the plaintiff is not sufficient evidence of the want of probable cause.
4. When instructions are given, although taken separately, each might be exceptionable; yet if, taken together as a whole, they contain a correct exposition of the law of the case, the judgment will not be reversed.
5. In an action for a malicious prosecution, the defendant may show that, in good faith, and upon a full representation of all the facts, he was advised by counsel that a prosecution was warranted, but he will not be permitted to show that he was advised by any other than counsel, as by the justice who issued the warrant.

ERROR to Cooper Circuit Court.

LEONARD, RICHARDSON and ADAMS, for Plaintiff.

1. There was a manifest variance between the warrant produced in evidence and the one set forth and described in the declaration, and the warrant, therefore, ought to have been excluded from the jury.

2. Where a party introduces evidence of the conversations of his adversary, he makes the whole conversation evidence.— See *Carver vs. Tracy*, 3 Johns. Rep., 427; *Fenner vs. Lewis*, 10 Johns. Rep., 38; *Credit vs. Brown*, 10 Johns. Rep., 365; *Wailing vs. Toll*, 9 Johns. Rep., 141; 7 Mo. Rep., 348.

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3. It devolved on the plaintiff to prove both malice and the want of probable cause, and the court erred in refusing an instruction to that effect.—2 Starkie; 6 Mo. Rep., 42; 2 Tucker's Com., 64; 4 Bur., 1971.

4. The court had no right to instruct the jury that the acquittal of the plaintiff was presumptive evidence of the want of probable cause.—2 Starkie, 682, and note G; 19 Cond. Eng. Com. Law Rep., 47; 22 Eng. Cond. Com. Law Rep., 56 and 195.

HAYDEN and MILLER, for Defendant.

1. The court very properly overruled the motion of defendant to strike out the second count.—See 2 Chitty, 610, and note (*d.*); Digest of 1835, p. 463, sec. 17.

2. The court very properly excluded the testimony offered by defendant, as to what witness or others may have said to defendant.—See 1 Starkie, 60, 61.

3. The court properly overruled the objection to the introduction of the writ and justices' docket, offered by plaintiff in evidence.—See 4 Bibb, 209.

4. The court properly gave instructions asked by plaintiff, and overruled those asked by defendant.

5. The court properly overruled the motions for a new trial, and in arrest of judgment.

SCOTT, J., delivered the opinion of the Court.

This was an action for a malicious prosecution, instituted by Vanmeter against Williams, in which Vanmeter had a verdict and judgment.

It is deemed unnecessary to set out the various counts in the declaration, as the point made by the defendant below, (Williams) in relation to the refusal of the court to strike out the second count, was abandoned on the argument of the cause.

On the trial in the court below, the plaintiff offered in evidence a warrant issued by J. N. Laurie, a justice of the peace, directed to the constable of Boonville city, reciting, that whereas information, on oath, had been given to him by F. A. Williams, that Robert Vanmeter, an able-bodied man, who, not having wherewithal to support himself, is found loitering about, and commanding him to take the body of the said Vanmeter, and bring him before the justice, to be dealt with according to law.

The said Laurie was then introduced as a witness, who testified, that Williams, at the time the warrant was issued, asked him if he had ever examined the vagrant law? to which the witness answered, he had not; that witness and Williams then examined the statute relative to vagrancy, and Williams inquired of the witness what he thought of the plaintiff, Vanmeter, and if he was not subject to said law? Witness answered said enquiry, but the court would not permit the witness to state what his answer was, to which the counsel for the defendant excepted.

The witness then testified, that after he had returned an answer to Williams' question, Williams put his finger on the first section of the vagrant act, and observed, "I give the information."

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At the instance of the plaintiff below, the court gave the following instructions:

1. That if the jury believe, from the evidence, that the prosecution by defendant of the plaintiff was without probable cause, then they may infer that the prosecution was malicious, and if they so find the facts, they ought to find for the plaintiff.
2. That the discharge of the plaintiff, by the examining magistrate, is presumptive evidence of want of probable cause.

To these instructions the defendant excepted.

The defendant then asked the following instructions:—

1. That unless the jury believe that the defendant was instigated by malice, and also, that there was no probable cause for the prosecution, that then they must find for the defendant.
2. That in this case it is not necessary to prove that the plaintiff was a vagrant, and if there was any probable cause for the prosecution, they must find for the defendant.
3. That it is incumbent upon the plaintiff to prove both malice in the defendant, and a want of probable cause for the prosecution.
4. That the acquittal of the plaintiff, by the justice of the peace, is not sufficient in itself to show the want of probable cause.

The court gave all these instructions but the third, the refusal to give which was excepted to by the defendant.

The first point made by the defendant was, that the court erred in admitting the warrant in evidence, as there was a variance between it and the declaration.

The declaration alleges, that the defendant falsely and maliciously, and without any probable cause, charged the plaintiff with a certain offence punishable by law, to wit, vagrancy. It is not denied but that the allegation in the declaration is sufficient. But because the offence is not legally set forth in the warrant, therefore it is urged, that it should have been rejected as evidence. It is not perceived on what ground this exception is founded. The conduct of the defendant gives the cause of action; he lodges the information with the officer issuing the process; and because that officer commits an error, and insufficiently describes the offence in his warrant, is his conduct thereby palliated or justified? The injury to the accused is the same whether the warrant is legal or illegal. The defendant is the cause of the prosecution, and will he be heard to say, that although he did all he could in furtherance of it, yet as the officer erred in describing the offence for which the prosecution was instituted, is he therefore excused? If an information of one offence was given, and a warrant issued for another offence entirely different, and a suit was instituted for a malicious prosecution of the offence described in the warrant, it would fail, as it would not appear that the prosecutor had given the information which caused the issuing of the process. But that is not this case. It sufficiently appears that the warrant was intended to arrest the plaintiff for the offence communicated by the defendant, and because it is not legally set forth, it cannot avail him.—*Miller vs. Brown*, 3 Mo. Rep.

The refusal of the court to give the third instruction asked by the defendant is also assigned for error. It cannot be denied but that instruction asserted a correct legal principle. In an action for a malicious prosecution, the plaintiff must show

a want of probable cause, and malice either express or implied, in the defendant. Malice may be inferred from the want of probable cause, but the want of probable cause cannot be inferred from malice, however rancorous. The instruction might have been given, but inasmuch as the principle it asserted had been announced to the jury as law in two previous instructions, the court was under no obligation to declare it a third time.

It was contended by the defendant, that the second instruction given at the instance of the plaintiff was erroneous, inasmuch as it conveyed the idea that the bare acquittal of the plaintiff by the justice was evidence from which the jury might infer a want of probable cause. It cannot be maintained that, in an action for a malicious prosecution, proof that the defendant instigated it, and a production of the record of acquittal, will entitle the plaintiff to a verdict. However, but slight evidence of the want of probable cause is exacted of the plaintiff, as it involves a negative; but we are not aware that the bare production of the judgment of acquittal has ever been held sufficient for that purpose. The acquittal, together with the circumstances under which it was effected, may be sufficient, as in the case put, where, upon the calling of the cause, the prosecutor, who was in court, absented himself. It was left to the jury to infer the motives of his withdrawal, and they were charged, that they might infer the want of probable cause from such conduct. An acquittal is evidence of the want of probable cause to go to the jury, but of itself, and unaccompanied with any circumstances, would not be sufficient.

When instructions are given by the court, although taken separately, each might be exceptionable; yet if, taken together as a whole, they contain a correct exposition of the law of the case, the judgment will not be reversed. Whatever objection might have been urged to the instruction complained of, and although of itself it might have conveyed an erroneous idea of the law, yet, taken in connexion with the fourth instruction given at the instance of the defendant, the ground of complaint is removed. The two instructions were not contradictory, but, taken together, they furnished a correct exposition of the law.

The judgment of the court below is also sought to be reversed, because the court refused, as evidence, the answer given by the justice to the inquiry of the defendant, what he (the justice) thought of Vanmeter, and if he was not subject to the vagrant law? It is contended, that the answer of the witness should have been received as explanatory of what was afterwards said by the defendant. Courts cannot be too cautious in receiving testimony irrelevant in itself, and of a character to bias or mislead the jury. But however important a rigid observance of this caution may be, it cannot be carried so far as to prevent a full disclosure of whatever may be necessary to explain declarations or acts, the subject of judicial inquiry. If testimony, otherwise inadmissible, is offered for this purpose, it should be received with a direction by the court to the jury of the object of its introduction, and a charge that it is inadmissible for other purposes in the cause. In the case of *Hawkins vs. The State*, 7 Mo. Rep., it was held, that the questions asked by a negro of a white person were admissible in evidence, in order to a correct understanding of the answers. The questions were not regarded as hearsay

evidence, but as facts, as a part of the *res gestæ*, and being proved by competent evidence to have been proposed, were properly admitted. It has been remarked, that the circumstances surrounding a principal fact under consideration, termed the *res gestæ*, may always be shown to the jury along with such fact; and their admissibility is determined by the judge, according to the degree of their relation to that fact, and in the exercise of his sound discretion, it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description. The principal points of attention are, whether the circumstances and declarations offered in evidence were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character. Thus, in the trial of Lord George Gordon, for treason, the cry of the mob who accompanied the prisoner in his enterprise, was received in evidence as forming a part of the *res gestæ*, and showing the character of the principal facts. So, where a person enters into land for any purpose, or changes his actual residence, or is upon a journey, or leaves his home or returns thither, or remains abroad, or secretes himself, or, in fine, does any other act material to be understood, his declarations made at the time of the transaction and expressive of its character, motive, or object, are regarded as verbal acts indicating a present purpose and intention, and are therefore admissible in proof-like any other material facts: they are parts of the *res gestæ*. (Greenleaf, 120.) It is easy to conceive, that, in numberless instances, the answers and replies of one in conversation with another cannot be understood without showing the declarations and remarks which elicited the answers. We are of the opinion that the court might have received the reply of the justice in evidence, not as hearsay, but as part of the *res gestæ*, and as explanatory of what followed, with a direction to the jury of the purpose for which it was admitted. But if we view the matter in a light most favorable to the defendant, and take it for granted that an answer most calculated to instigate him to give the information which he afterwards lodged against the plaintiff was made by the justice, yet the judgment will not be reversed, as any inducements, however strong, held out by the justice to the defendant, to institute the prosecution, were inadmissible to disprove malice or in mitigation of damages. It has been held, that in a prosecution for a malicious arrest, it may be given in evidence that the party acted under the advice of counsel. In analogy to that case, the defendant, in actions like this, would probably be permitted to show, that in good faith, and upon a full representation of all the facts, he was advised by counsel that a prosecution was warranted. But to permit the counsel of those whose capacity we have no means of judging, and who owe no responsibility to the courts to be received as evidence, would lead to collusion, and furnish a ready defence in all actions like the present. As this evidence was inadmissible to disprove malice, it could not be received in mitigation of damages, as it could only produce that effect by showing a want of malice.

Judgment affirmed.

CROOK AND THURSTON vs. PEEBLY.

A person claiming an estray as taken up must show that all the pre-requisites of the law have been complied with. He must show the performance of all those acts which the law requires to be performed, in order to vest the property of the estray in him.

APPEAL from Morgan Circuit Court.

RICHARDSON and KOUNSLA, for Appellants.

1. The Circuit Court erred in giving the instructions asked for by the plaintiff, and in refusing the first instruction asked for by the defendants. (The Statute of 1835, concerning strays, makes it the duty of the Secretary of State to select and contract with one printer on each side of the Missouri River to print advertisements of strays, and requires the clerks of the county courts to furnish the printer with the proper papers for advertisement, and to account with the printer for publishing the same. The law of 1825 required the taker up of an estray to have a proper notice thereof printed in some newspaper; and in this respect the existing law upon the subject of strays differs from the law of 1825.)

2. The duties of the taker up of an estray cease, under the present law, when he has paid "to the clerk all fees, the necessary postage, and the price of advertisements;" and if the printer or clerk fails to do his duty, he forfeits to the county a penalty.—See 2 Digest of Missouri of 1825, 756; also, Digest of 1834 and 1835, p. 594-6.

3. Every officer is presumed to have performed his duty, and discharged the trusts enjoined upon him by the government, until the contrary is proved.—Buller's Nisi Prius, 298, Hickman vs. Boffman; Harding's Rep., 348, Hartwell vs. Root; 19 Johns. Rep., 362.

ADAMS and HAYDEN, for Appellee.

1. It was the duty of the defendants to show that every requisite of the stray law had been complied with, and not for the plaintiff below to prove a negative.—See Hanyman vs. Titus, 3 Mo. Rep., 302; Laws of Missouri of 1835, title, "Strays."

2. That there is no presumption in favor of a party claiming title by an ex-parte proceeding; that officers or third persons have performed their duty; but the party who claims the title thus derived must make that appear.—Morton vs. Reed, 6 Mo. Rep., 64.

3. That there was no proof that the appraisers were disinterested, or that the stray had been advertised, and the verdict was therefore for the right party.—See the case of Hanyman vs. Titus, above cited.

Crook and Thurston vs. Peebly.

SCOTT, J., *delivered the opinion of the Court.*

This was an action of trover, brought by Peebly, against Crook and Thurston, for a horse, the property of Peebly, taken up by Thurston as a stray, and sold to Crook. On the trial, Peebly had a verdict and judgment.

The court below directed the jury, that it was necessary for the defendants, in order to show property in themselves, to prove that notice of the taking up of the horse as a stray had been published in some newspaper authorised to publish the same by law. This direction was excepted to, and the defendants moved the court to instruct the jury, that in order to show property in themselves, they were not bound to prove that the appraisers were disinterested householders, and that it was not necessary to prove that notice of the taking up of the stray had been published in a newspaper authorised by law to publish stray notices. This instruction was refused, and the defendants excepted.

It was urged for the defendants, that the stray law now in force was different from that of 1825, under which the opinion of this Court, in the case of *Henryman vs. Titus*, 3 Mo. Rep., was pronounced. That the act of 1825 required the taker up of an estray to publish notice of the fact in some newspaper, but by the law now in force the taker up is relieved of that burden, and upon paying the necessary fees to the clerk, it is his duty to transmit the notice to the publisher of stray advertisements, who is required to publish the same.

The law divests the property of the owner of an estray, and vests it in the taker up, upon the performance of certain acts by him and others. The performance of those acts are essential pre-requisites, in order to pass the property of the owner. It was argued, that the law will presume that an officer has done his duty, and therefore we are bound to presume that those acts have been done which they are required to do. But a party who sets up a title to property, must show the evidence necessary to support it. The acts of the officer constitute a link in the chain of title, the evidence of which it is necessary to preserve. When an estray is taken up, the person taking it up knows what the law requires, in order to vest the stray in him. It is his duty to see that the requisitions of the law are complied with, and it is an easy matter to preserve the evidence of such compliance. If the law would presume, in favor of the taker up, that the officers had done their duty, it cannot be denied but that the presumption might be rebutted, and is it not easier for the taker up to show the performance of the acts necessary to give him title, than for the owner to prove the negative?

These principles were maintained in the case of *Henryman vs. Titus*, decided by this Court many years since, and no law has come under the review of the legislature oftener than that concerning strays. Yet it has never been deemed expedient to relieve the taker up of an estray from the necessity of proving the performance of those acts which that case required to be established, in order to vest the property of an estray in him.

Judgment affirmed.

TOMPKINS, Judge.—I concur in affirming the judgment, because it is not apparent on the record that the appraisers were disinterested householders.

ALLISON vs. BOWLES.

The 4th section of the act of February 11, 1835, concerning fraud, (R. S. 1835, p. 283,) rendering void certain conveyances of personal property, "as against creditors and purchasers," &c., embraces only creditors of, or purchasers from, the parties to the conveyance. A purchaser from a person not a party to the conveyance, but having only the possession of the property in right of another, and not deriving title under the conveyance, is not embraced within this section.

APPEAL from Cooper Circuit Court.

HAYDEN and RICHARDSON, for Appellant.

1. The court below erred in refusing to permit the appellant to show that Ryan was in the possession of the negro for many months, in Boonville; that he used and treated her as his own property; that Bowles kept his claim secret from Allison, and that the possession of Ryan was with the knowledge and consent of Bowles; and that Bowles permitted Ryan to bring said negro with him from Virginia, where plaintiff resided, to Missouri.

2. That possession of personal property raises the presumption of ownership.—3 Bibb, 93; J. Marshall, 56, 7; 1 Mo. Rep., Irwin vs. Wells, 9; 1 Mo. Rep., 561.

3. That the court erred in refusing to give the instructions asked by the defendant.

STUART and MILLER, for Appellee.

There was no error in permitting the plaintiff's evidence to go to the jury.

The execution of the original deed was proven by the depositions: the certificates on the deed are in accordance with the acts of Virginia, and were read to prove that the deed had been properly recorded in the state of Virginia. The objectionable parts of the depositions were not read to the jury.

The instructions of the defendant were properly refused, because—

The defendant not being either a purchaser or a judgment creditor of the parties to the deed, could not attack the transfer from Stephen to Paul Bowles on the ground of fraud. The deed was a good deed against all but creditors and purchasers of Stephen Bowles.—5 J. J. Marshall, 87; 4 Monroe, 581; 4 Monroe, 122; McCreary vs. Parcely, 1 Marshall, 114; 7 Mo. Rep., 127; 1 Pirtle, p. 473, sec. 65; 3 Littell, 10; 7 Monroe, 268.

The bare possession of Ryan gave him no power to sell. He was a mere bailee with the permission of the plaintiff, and in accordance with the terms of the deed of trust. The deed expressly precluded him from exercising acts of ownership, and in selling he was attempting to commit a fraud upon the plaintiff, and it is immaterial whether Allison knew the extent of his right. The doctrine of *caveat emptor* required him to ascertain by what right Ryan held the negro.—Hardin's Rep., Chism vs. Woods, 531.

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The possession of Ryan was no evidence of title in this cause against the plaintiff, who had established a paramount right. His possession was not adverse but by permission of the plaintiff, under the authority of the deed.—Hardin's Rep., 531, *Chism vs. Woods*; 2 Starkie, 656, title, "Possession;" 1 Dana, 115, *Pool vs. Adkinson*.

That the deed of trust from Stephen Bowles to Paul C. Bowles would have been good against the grantor, his heirs and all other persons but the creditors of, or subsequent purchasers from, the grantor, Stephen Bowles, had it been unrecorded, as the laws of Virginia require.—5 Cranch, 154, *Pierce vs. Turner*.

That when a wife or child has the legal or equitable title to personal property, and such wife or child resides with a husband or father, who exercises control or authority over such personal property, yet the law deems the possession with the person holding the title.—2 Pirtle's Digest, title, "Possession," p. 205, sec. 79; 3 J. J. Marshall, 280.

NAPTON, J., delivered the opinion of the Court.

This was an action of trover brought by the defendant in error, Paul C. Bowles, to recover the value of a negro girl, alleged to have been converted by the defendant to his use.

On the trial, the plaintiff produced a deed of trust from Stephen Bowles, of Amherst county, Virginia, granting to him the slave in controversy, in trust for the daughter of the grantor, Elizabeth Ryan, during her life, with remainder to her children living at the time of her death; and authorising the trustee to hire out the said slave, or permit Mrs. Ryan to remain in possession of her, as he should deem most to the interest of the said Elizabeth, but in no wise to suffer the husband of the said Elizabeth to exercise any control over the slave. This deed was duly executed, acknowledged and recorded, in pursuance of the laws of Virginia regulating such conveyances. The title of Stephen Bowles, the grantor in the deed, at the time of its execution, was also established.

The defendant claimed by virtue of a sale made by Ryan, the husband of the *cessui que use*, who removed from Virginia to Missouri shortly after the execution of the deed, and whilst here sold the slave to defendant for three hundred and fifty dollars.

The defendant offered to prove that Ryan was in possession of said negro for eight or nine months; that he exercised acts of ownership over the said slave; that defendant had no notice of the claim of said Paul C. Bowles; that said Bowles kept his claim secret from defendant, and that the possession by Ryan of this slave was with the knowledge and consent of said Bowles. This evidence was rejected by the court.

The defendant also offered to prove, that the conveyance of the slave from Stephen Bowles to the said Paul C. Bowles was a feigned and pretended sale, and that the same was fraudulent and void; but the court refused to permit the defendant to give this proof.

The judge instructed the jury, that if the said Ryan was merely entrusted with

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the possession of said negro, without any power or authority from the owner to sell said girl, that such sale could convey no title, although the purchaser had no knowledge of the plaintiff's claim; and refused to instruct the jury, at the instance of defendant, that the possession of Ryan was *prima facie* evidence of title, and that the purchase by the defendant, for a valuable consideration, without notice, was a good defence to the plaintiff's action.

The plaintiff had a verdict and judgment for the value of the slave.

To reverse this judgment, it is relied, that the court erred in its instructions, and in excluding the defendant's testimony.

This was a contract executed in Virginia, where all the parties resided; and it is conceded that its acknowledgment was in due form, and that, by the laws of Virginia, it was good against creditors and purchasers.

It is a settled maxim, that personal property has no visible locality, but is subject to the law which governs the person of the owner, both with respect to the disposition of it *inter vivos*, and its transmission, either by succession or the act of the party. (*Sill vs. Wenwick*, 1 H. Bl., 690.) If any question had arisen in relation to the construction of this contract, and there was a conflict between the law of Virginia and the law of this State on that subject, the former, as the *lex loci contractus*, would prevail. But it is not seen, that any question of this character has been raised. We are not apprized of any different construction prevailing in Virginia from that which would govern the construction of the contract in this State.

If this conveyance be within the meaning and provisions of our statute of frauds, and requires recording to be available against purchasers and creditors, the claims of the creditor or purchaser will not be affected by the circumstance that the deed was made in another state. When citizens of other states remove to this state, their personal rights and duties, whilst within its jurisdiction, must be regulated by its laws, and not by the laws of the state from which they emigrated.

It becomes, then, material to inquire whether the defendant was protected in his purchase by our statute.

The 4th section of the act concerning frauds provides, that voluntary conveyances of slaves, &c., are void against creditors and purchasers, where possession does not *bona fide* accompany such gift or conveyance, unless the deed be recorded.

The defendant here purchased, not from any of the parties to the conveyance, but from a person to whom the law, and not the deed, had entrusted the possession of the property. If the statute be construed to protect such purchasers, it might be very well doubted whether it would not itself become an instrument of fraud.

The statute was designed to protect against the frauds of the donor or donee, vendor or vendee, and could not intend to place the estate at the mercy of third persons, not parties to the deed. We are the more confirmed in this impression by observing this has been the uniform construction of the statute in Kentucky, where cases similar to the present have occurred frequently, and been passed upon by their courts.

In the case of *Forsyth vs. Kreakbaum*, 7 Mon. Rep., 79, the court declared, that where the property was held by a person as the mutual guardian or fiduciary of a

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third party, who has made no sale or loans, and contracted no debts to be defrauded, they would not suffer the acts of such fiduciary or guardian to affect the interests of his *cessui que use*. "It would be a merciless act of the law," the court observes, "to deprive an infant of possession, and declare him or her incapable of managing the estate, and for this cause assign the possession to another, and afterwards make it a fraud in the infant for permitting that possession, and subject the estate to the debts or sales of him to whom the law confided the possession, barely because he had the possession."

In this case the court held the possession of the father to be the possession of the child, and the father being neither the borrower nor the lender, grantor or grantee, the estate was held not subject to his debts or sales.

The same principle was maintained by the same court in *Kenningham vs. McLaughlin*, 3 Mon. Rep., 31. That was a case where the grandfather had given a slave to his grand child, and the creditors of the father sought to make it liable to his debts. The court held the case not within that section of the statute which vitiates loans and grants for more than five years, where the reservation of title is not made in writing, or possession does not accompany the grant. And it is worthy of observation, that this clause of the act (which in our statute is the 5th section,) in terms, protects the creditors and purchasers of the party *in possession*. But the court said, "This is not a grant from the father to the child, he remaining the ostensible owner. It is neither a loan nor a gift from the grandfather to the father, but a positive gift to the grandchild. Neither the creditors of the grandfather nor of the grandchild have disturbed the title, but the creditors of the father, to whom the slave was never given or loaned, but in whose custody the slave remained, from necessity, as the natural guardian of the child, who was not able to protect her own interests. The possession of the father must, then, be considered the possession of the child; and although this possession, being apparently in the father, might give him a delusive credit, yet, subjecting the slave to his debts would punish the child for an offence in which she had no participation, and present the absurdity of taking her property from the custody of him to whom the law gave it for her, and subjecting it to his debts."

In *Orr vs. Pickett*, 3 J. J. Marshal, 280, the court further held, that where the title was not in the infant, but in another who was bound to hold the title for the infant, the possession should still be considered as in the infant as *cessui que use*, although the father was entitled in law to the possession.

In principle, it is difficult to see any distinction between the cases cited, and the case now under consideration. The rights, powers and liabilities of a married woman are more restricted, and her interests as much protected by the law as those of an infant. It might well be questioned, then, whether the possession of the husband is not to be regarded in such cases as the possession of the wife, as much as the possession of the father is the possession of the child.

We deem it unnecessary, however, to determine, whether the possession of Mrs. Ryan, in this case, was such an one as would be sufficient, under the 4th section of our act, to supersede the necessity of recording.

Allison vs. Bowles.—Lowe and Forsythe vs. Harrison.

It is sufficient that the party objecting to this conveyance has derived no title from any party to it, and is not a purchaser within the protection of the statute.

As to the instructions which the defendant asked of the court, the principles asserted in them were unquestionably correct, but not applicable to the case before the jury.

The maxim of law, that possession is *prima facie* evidence of title to personal property, is very much misconceived, if it be supposed to sanction the idea, that in general, and without reference to special statutory enactments, a possessor of such property can, by a breach of faith, transfer a title which he has not himself. Such a deduction would destroy all confidence in society, and place the prudent and cautious upon a footing with the fraudulent or careless. It would subvert the maxim of *caveat emptor*, which has been held applicable to personal as well as real property, and which, whilst it requires a suitable vigilance on the part of the purchaser in relation to the quality of the thing purchased, enables him at all times to rely on the vendor for his title. The possession of personal property, instead of being *prima facie*, would be conclusive evidence of title, if the possessor, by casualty or in a fiduciary character, can *mala fide* convert that possession into title; and, as was observed by Judge Trimble, in the case of *Chism vs. Woods* (Hardin) "many legislative enactments to prevent frauds were mere supererogations, and the action of warranty of title to personal goods, so frequent in the books, could only have been necessary where a felony had been committed by some one through whose hands the goods had passed, or where, in reality, there had been a loss and a finding."

Judgment affirmed.

LOWE & FORSYTHE vs. HARRISON.

In an action of trespass, where the declaration contains counts under the statute and at common law, and entire damages are assessed, the damages will not be trebled, it not appearing from the verdict that the damages were assessed the statutory counts only.

Quære.—Should not a declaration in trespass, under the statute, in order to bring the offence within its terms, aver that the defendant had no interest or right in the property taken away, and that it was on land not his own?—See Rev. Stat., 1835, title, "Trespasses," p. 612.

ERROR to Cooper Circuit Court.

ADAMS, for Plaintiffs in Error.

1. The verdict in this cause applies as well to the common law counts as to the counts under the statute, and it is only where the trespass is founded upon the statute that treble damages can be given.

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2. That the judgment must correspond with the verdict, and the court cannot, in this case, apply the verdict to the statutory counts; the rule being, that a general verdict applies to the whole declaration, so that at common law, where some of the counts were bad and a general verdict was found, the court would arrest the judgment, because the court could not know upon what counts the jury found.—1 Chitty's Plead., 448; 2 Saund., 171, B; 1 Term Rep., 151; *Trevor vs. Wall*, 3 Term Rep., 435; 5 Johns. Rep., 476.

3. In this case the party had a right to join the common law counts with counts under the statute, but he certainly has no right to treble damages on the common law counts, and the verdict being general, the court cannot confine it to the statutory counts.—4 Mo. Rep., 564.

4 Suits for trespasses under the statute ought to be brought in the name of the county where the trespass is committed.—See *Laws of Missouri*, 1839, p. 173, title, "Trespass."

STUART and MILLER, for Defendant in Error.

1. The court below very properly overruled the motions in arrest, and for a new trial. The declaration in this case is brought under the statute, and though there be several counts in a declaration, and reference is made to the statutes, it is sufficient if the declaration state facts which will appear to the court to be affected by the statute.—See 1 Chitty, 246 and 404.

2. Public statutes, and the facts which they state or recite, must be noticed by the court, without their being stated in pleading.—Same reference.

3. The conclusion of the declaration shows it to be a suit under the statute, and was so recognized by defendants when they filed their notice of special matter to be given in evidence.—See *Digest of Mo.*, 612; *George vs. Rook*, 7 Mo. Rep., 149.

4. By reference to the record in the case of *George vs. Rook*, it will be found, that the declaration contained two counts, and no reference is made in either count to the statute except in the conclusion, and there the trespass is alleged to be "contrary to the form of the statute," and in that case the Supreme Court trebled the damages.

5. If, by the declaration, reference is made to the statute, so as to show that the party sues under the statute, or the acts or trespasses fall within the statute, it is sufficient.—See 5 Cowen, 685; 6 Cowen, 295.

SCOTT, J., delivered the opinion of the Court.

This was an action of trespass. The declaration contained four counts; the first two were at common law, and the last two on the statute to prohibit certain trespasses. The last count concluded against the form of the statute. On the trial, the plaintiff obtained a verdict, and the damages were trebled by the court.

The question presented by the record is, whether the damages should have been trebled? It has been determined by this Court, in the case of *Withington vs. Young*, 4 Mo. Rep., that a plaintiff may join, in the same declaration, counts for

trespass at common law, and counts under the statute. At common law, if a declaration contained several counts, and there was a general verdict on all the counts, and entire damages assessed, if any of the counts were bad the judgment would be arrested, because it could not be ascertained but that a portion of the damages were given on the bad counts. In all declarations on a statute it is necessary to conclude against the form of the statute, although all circumstances necessary to support the action be alleged. (Chitty, 405.) If a declaration contained several counts, they are for all purposes as distinct as if they were in separate declarations, consequently they must independently contain all necessary allegations, or the latter count must expressly refer to the former. (Chitty, 450.) It will follow, then, that the allegation at the conclusion of the last count in the declaration, *contra formam statuti*, will not be regarded as relating to the other counts in the declaration. In declarations on statutes containing several counts, the precedents will show that each count concludes, *contra formam statuti*. (2 Chitty.) In this case, then, there are counts at common law, and counts on the statute, and entire damages have been assessed. The damages can only be trebled on the statutory counts. If in contemplation of law, a portion of the entire damages is assessed on each count, how can the damages be trebled without a violation of law? This difficulty might have been obviated if the jury had been instructed to assess damages on each count, if as many distinct offences had been proved, or if, before the trial, the plaintiff had entered a *nolle prosequi* as to the common law counts.

In the case of *George vs. Rook*, 7 Mo. Rep., the only point decided was, that a verdict in an action of trespass under the statute will be deemed for single damages, and that the court should treble them.

The question involved in this case has been expressly decided in *Benton vs. Dale*, 1 Cowen, 160, in which it was held, that, to entitle a party to treble damages, the verdict must be on a count or counts under the statute expressly, and it is not sufficient that it be upon a count on the statute, and a general count in the same declaration. Indeed, it may be questioned whether any of the counts in this declaration are upon the statute, although reference is made to it.

Should not the plaintiff have employed in his declaration the words used in the act, in order to bring the offence within its terms, viz., that the defendant had no interest or right in the property taken away, and that it was on land not his own? If these words are discarded in declarations under the statute, then the only difference between a statutory count and one at common law is, that the one concludes *contra formam statuti*, and the other does not.

Judgment reversed, and judgment will be rendered for single damages.

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THE STATE, TO USE OF CRAWFORD AND ADAMS, *vs.* WOODWARD ET AL.

Covenant will not lie on a penal bond conditioned to be defended by the performance of collateral conditions. Therefore, it will not lie on a sheriff's bond.

ERROR to Cooper Circuit Court.

HAYDEN, *for Plaintiff.*

Covenant will lie upon a sheriff's bond, and the court erred in deciding to the contrary.—1 Chitty, pp. 131, 3, 4; 1 Pirtley's Digest, 227, sec. 132; 2 Bibb, 465; 3 J. J. Marshall, 496, Davis *vs.* Noaks; 4 Bibb, 314; 1 Saunders, 58, *a*, note 1; 3 Comyn, 250; 3 Johns. Rep., 44, Hallett *vs.* Wylie.

ADAMS, *for Defendants.*

1. Covenant will not lie upon a sheriff's bond.—See Wm. Clark, Governor of Missouri, to the use of William Gentry *vs.* Durat, &c., 1 Mo. Rep., 114; Digest Laws of Mo., 1835, p. 261, sec. 54; 1 Payne's Crim. Court Rep., 422; 1 Peters' Digest, 688.

2. The securities in a sheriff's bond are not liable for a greater amount than the penalty of the bond, and in an action of covenant, a greater amount than the penalty might be recovered.

SCOTT, J., *delivered the opinion of the Court.*

This was an action of covenant on a sheriff's bond, against him and his securities. The declaration contained two breaches of the condition of the bond, and after the assignment of the breaches it is averred, that the defendants have not paid the penalty. To this declaration there was a demurrer, on which judgment was rendered for the defendants.

The question is, whether an action of covenant will lie on a sheriff's bond? It is clear that, by the common law, an action of covenant was a concurrent remedy with debt on a single bill obligatory, or a penal bond subject to be defeated, by the performance of conditions. In such an action, the breach of covenant would be the non-payment of the debt in the one case; in the other, the non-payment of the penalty, and on that breach, damages would have been assessed equal in amount to the penalty for which judgment would have been rendered, and the defendant, in order to obtain relief against the penalty, was driven to his bill in equity. This being found oppressive, the common law was altered by the statute of 8 & 9 William the Third. Our statute regulating actions on penal bonds is similar to the English law, and declares that when any action shall be prosecuted in any court of law, upon any bond for the breach of any condition, other than

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for the payment of money, or shall be prosecuted for any penal sum for the non-performance of any covenant or written agreement, the plaintiff in his declaration shall assign the specific breaches for which the action is brought. (Section 5.) The sixth section of said act prescribes, that upon the trial of such actions, if the jury find that any assignment of such breach is true, they shall assess the damages occasioned by the breach, in addition to their finding, or any other question of fact submitted to them.

It must be admitted, that in all actions of covenant, some breach of covenant must be assigned, otherwise the declaration is bad. In a bond for the payment of \$5000, conditioned to be void upon the faithful discharge of the duties of an office, wherein consists the covenant? Is the condition a covenant? It cannot, with any propriety of language, be so called. It is a collateral thing, which the obligor has not covenanted to do, and which he may do or not, without violating any covenant, if he is willing to pay the penalty. A. binds himself to pay B. \$1000, to be void on condition that A. performs a journey to Rome. Does A. thereby promise to go to Rome? By no means. He covenants to pay money, and the journey to Rome is only an act by which he may relieve himself from his obligation to do so, and which he may do or not without violating any covenant. (United States vs. Brown, Payne's C. C. Rep., 422; Gentry vs. Murphy, 1 Mo. Rep.) If a breach must be assigned in an action of covenant, and as there can be no breach of covenant assigned in a declaration on a bond for the payment of money, to be void upon the performance of collateral acts, but the non-payment of the penalty, damages must then be assessed for that breach, otherwise there would be no authority in the record to enter a judgment for the amount of the penalty. An action of covenant is brought for the non-payment of the penalty of a bond, where would be the warrant in the record to enter judgment for the amount of the penalty, unless damages were assessed on the breach assigned for the non-payment of it, and judgment would be rendered for the damages. How can this be reconciled to the eighth section of the above-recited act, which directs, that if the plaintiff recover, the verdict assessing the damages shall be entered on the record, and judgment shall be rendered for the penalty, or for the penal sum forfeited, as in other *actions of debt*? If any thing were wanting to show that the legislature contemplated that the action on penal bonds, where the penalty is sought to be recovered, should be debt, it would be the ninth section of the said act, which ordains that the execution on a judgment in actions on penal bonds shall be in the usual form in actions of *debt*. There is a plain difference between a judgment and execution in debt and in covenant. Why, then, should a court which has any regard for the forms of the law permit a party to sue in covenant, when a statute directs that the judgment and execution in the action shall be in debt? Why permit this incongruity? Are there not anomalies enough already in the laws?

The plaintiff has referred the court to Mansur's case, cited in 1 Saunders, 58, *a*, in which it was holden, that at common law the plaintiff could only assign one breach upon a bond or penal sum, for the performance of covenant; for if he assigned several breaches, the declaration was bad for duplicity, because the bond was forfeited by the breach of one covenant as much as of several covenants; but

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in an action of covenant he may assign breaches upon every one of the covenants. This was a clear principle, but its application to the case now under consideration is not seen. Mansur's case was determined under the common law prior to the statute of William III., before referred to. On the same page in Saunders to which the court was referred, it is said by a late editor of the work, in speaking of the statute of William III., "*that it is evidently confined to actions of debt,*" and so it is regarded by all elementary writers. It is understood that this opinion is only intended to maintain that an action of covenant will not lie on a penal bond conditioned to be defeated by the performance of collateral conditions, and the word "condition" is used as contradistinguished from covenant.

Judgment affirmed.

T. & P. MILLER, TO USE OF MORRISON & PERRY, vs. PAULSELL & NEWMAN.

1. An assignment of all the assignor's "*goods and chattels, effects and property of every kind,*" for the purpose of paying debts due by the assignor, is not such an assignment of a bond held by the assignor at the time of the assignment, as will enable the assignee to maintain an action thereon in his own name, under the act concerning "bonds and notes."—Rev. Statutes, 1835, p. 105.
2. The assignment of a bond or note must be in writing, to enable the assignee to maintain an action thereon in his own name, and the writing itself should show whether the assignment had been made: parol evidence is inadmissible to prove that fact.

ERROR to Cole Circuit Court.

MINOR and BAY, for Plaintiffs.

1. The Circuit Court erred in permitting the deed of assignment from Thomas and Philip Miller to Ewing and Irvine to be read in evidence: because—

1st. The deed does not contain any assignment of the bond sued on to Ewing and Irvine.

2d. The deed of assignment was only made for the purpose of enabling the assignees to sell the property assigned, and to collect the outstanding debts due the firm of T. & P. Miller, and apply the same to the payment of debts due by that firm.

3d. An assignment of all the assignor's "*goods and chattels, effects and property of every kind,*" for the purpose of paying debts due by the assignor, is not an assignment of a bond held by the assignors at the time of the assignment, so as to enable such assignee to maintain an action thereon in his own name, within the meaning of the 2d section of the act concerning "bonds and notes." (Rev. Statutes, 1835, p. 105.) And such an assignment certainly does not show that a particular bond or note, executed to the assignee previous to the execution of the deed, passed to the assignee under and by virtue of the deed.

T. & P. Miller, to use of Morrison and Perry, vs. Paulsell and Newman.

2. The evidence of Philip Miller was wholly irrelevant and incompetent: because—

1st. A *bond* or *note* cannot be assigned by *parol*, so as to enable the assignee to maintain an action thereon in his own name.—*Thomas vs. Cox*, 6 Mo. Rep., 506.

2d. The introduction of this testimony is an admission on the part of the defendants that the deed of assignment does not contain any assignment of the bond sued on to Ewing and Irvine.

3d. It is admitted that a bond or note may be assigned on a paper separate from that on which the bond or note is written, but it is contended that the assignment must appear from the writing, and that the party, on failing to make out the assignment by the writing, cannot resort to *parol* testimony to supply the defect. This principle is applied by the courts in construing the statute of frauds.—See 1 *Sugden on Vendors*, 104, 5; *King vs. Wood*, 7 Mo. Rep., 389.

4th. The testimony of Philip Miller assumes the whole matter in controversy. The question is, whether this bond passed to Ewing and Irvine by said deed of assignment so as to enable them to maintain an action thereon, in their own names, as assignees? This is a matter of law to be determined upon inspection of the deed of assignment, and yet Philip Miller is permitted to testify "that said bond was included in the property mentioned in said deed of assignment, and passed to said Ewing and Irvine by and under said deed of assignment." No principle of law is better settled than that a witness must state *facts* which are known to him, and not *legal* conclusions.—1 *Starkie on Evidence*, 151; *Garrett vs. The State*, 6 Mo. Rep., 1.

3. The court refused to permit the plaintiff to read the bond in evidence, and yet permitted Miller to testify in relation to the bond. If the bond was not in evidence, how could Miller, or any one else, swear that the bond sued on was included in the deed of assignment? The bond was not before the witness, and he could know nothing about it. His whole testimony is predicated upon the supposition that the bond was in evidence before the court.

LISLE and EDWARDS, for Defendants.

1. The Circuit Court did not err in permitting the deed of assignment to be read. It is not required by law that the assignment of bonds and notes should be written on the bonds, or notes themselves.—See *Rev. Stat.*, p. 104; 2 *Bibb*, 83; 3 *Monroe*, 46.

2. The court did right in receiving the testimony of Philip Miller. Whether the bond sued on was transferred by Miller & Miller, in their deed of assignment to Ewing & Irvine, was a latent ambiguity, to explain which it was proper to produce *parol* testimony. *Parol* testimony is always admissible to explain the latent ambiguity in deed.—2 *Starkie's Ev.*, 546; 2 *Kent's Com.*, 556, note *b*.

3. The court did not err in refusing to permit the plaintiffs to read the bond in evidence.

4. The court did right in refusing to set aside the non-suit.

5. By the deed of assignment of the said T. & P. Miller, all their property, of

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every nature and kind, was vested in their assignees, and they became the owners thereof, and the said Miller & Miller cannot maintain an action on any debt due or owing them at the time, or prior to the time, of making said adjournment.

SCOTT, Judge, delivered the opinion of the Court.

This was an action of debt on a bond instituted by T. & P. Miller, to the use of Perry & Morrison, against the defendants, Paulsell and Newman. On the trial of the issue, on the plea of *non est factum*, with notice of the special matter, the following facts appeared in evidence:—T. & P. Miller made a general assignment of all their lands and tenements, goods and effects, to R. A. Ewing and J. E. Irvine, for the benefit of their creditors. The words of the deed of assignment describing the personalty conveyed, were these, viz., “All their goods and chattels, effects and property of every kind.” The bond sued on was not mentioned or described otherwise than in the words set forth. After the introduction in evidence of the deed of assignment, a witness was produced, who testified, that the bond sued on was part of the effects of T. & P. Miller, and was conveyed by the deed of assignment. This was objected to. The court thereupon refused to permit the plaintiffs to read the bond in evidence. The plaintiffs suffered a non-suit and moved to set it aside, which motion was overruled.

The question is, whether the suit should have been brought in the name of T. and P. Miller, or by Ewing & Irvine, the assignees? Or in other words, whether there was such an assignment of the bond as took away the right to sue on the same, in the name of T. and P. Miller? This is a question not involving the right to the bond, but simply the mode in which they who are unquestionably entitled to it shall maintain an action upon it. Under such circumstances, the court should be influenced by considerations of convenience and facility to creditors, in recovering their demands. It is a matter of indifference to the defendants in whose name the suit is brought, as they are not jeopardized by one mode more than another. In the case of *Isbell and Abel vs. Shields and Hickerson*, (7 Mo. Rep.,) this Court held that a bond or note might be assigned by writing on a separate piece of paper or instrument. In that case there was a specific assignment, or an assignment in terms, which described the instrument. That opinion was dictated more by a respect for adjudged cases, than from a thorough conviction of its correctness, it being presumed that the legislature, in adopting the statute of a sister State, adopted likewise the interpretation put upon it by her courts, as it was generally known. We are now required to go a step farther, and sanction a construction of the statute concerning bonds and notes which would, in many cases, involve the holder of them in difficulties in bringing suit, and turn him out of court on points altogether beside the merits of the action. Unless there is imperative authority for such a course, a regard for the due administration of justice should induce us to avoid it. The statute concerning bonds and notes declares, that all bonds and promissory notes for money or property shall be assignable, and the assignee may maintain an action thereon, in his own name, against the obligor, or maker. This provision has been held imperative on the assignee to institute suit

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in his own name. So, too, in the construction of this statute, it has been determined that the assignment must be in writing, to enable the assignee to maintain an action in his own name. If the assignment must be in writing, the writing itself should show whether it had been made or not, and it would be a subversion of the rule to receive parol evidence in order to show that it had been made.

As to the point respecting the admissibility of the parol evidence to show that the bond sued on was included in the assignment, it may be observed, if this were a suit in which the right of T. & P. Miller's assignees to the bond was involved, the evidence would clearly be admissible, on the principle, that a resort to parol evidence is allowed to ascertain the subject-matter of a conveyance, so as to satisfy the description. If in the conveyance of an estate it is denominated *Blackmore*, parol evidence must be admitted to show what field is known by that name. Upon the same grounds, where there is a devise of an estate purchased of A., or a farm in the occupation of B., it must be shown by extrinsic evidence, what estate it was that was purchased of A., or what farm was in the occupation of B., before it can be known what is devised: but the evidence is inadmissible for the purpose for which it was received.

Judgment reversed.

WARD ET AL. vs. STEAMBOAT LITTLE RED.

1. Plaintiffs, who were the owners of a ferry-boat, brought suit against defendant, under the act concerning boats and vessels, for an injury to their reversionary interest in the boat. Some of the plaintiffs were minors, and sued by guardian. It appeared, that the adult plaintiffs had leased the boat to one Ward, but it did not appear that the lease was executed by the infant plaintiffs, or their guardian: *Held*, that the infants, by joining in the suit, had affirmed the contract of the other part-owners.
2. An infant can become a party to a contract, made without authority from him, by his subsequent adoption of it, as well as by his previous express consent. If an infant affirms a contract, he alone can say that he is not bound. None but the infant himself can avoid his contracts.

ERROR to Cooper Circuit Court.

Todd and Hayden, for Plaintiffs.

The plaintiffs contend, that the evidence offered was competent and legal, and will maintain the action: because—

1. The plaintiffs were partners, sharing in the profit and loss of the business.—*7 Mo. Rep., 560.*
2. Infants may be partners.—*Gow on Partnership, 1, and in same note (1), must join in an action by the firm; same, 128.*

3. Contracts, gifts, and grants beneficial to the interest of infants, will be enforced, and the law implies acceptance.

LEONARD and MILLER, *for Defendant.*

The instructions were properly given, and the court properly overruled the motion to set aside the non-suit and grant a new trial.

1. Because the suit was brought in the name of the infants, Paulina and George W. Parker, by their guardian, Rebecca Parker, and complainants offered no record or other sufficient evidence of her guardianship.—See 4 Bibb, 14, *Floyd vs. Breckenridge*; same book, 391; *Henderson's Administrator vs. Clark*, 1 Saunders, 275, note *a.*; 2 Saunders, 47, *n.*; 2 Starkie, 315, title, "Executors and Administrators;" 2 *Ibid.*, 297, and notes; 2 Lord Raymond, 824, *Marshfield vs. Marsh*; 3 Taunton, 113, *Hunt vs. Stephens*; 2 Campbell, 272; 2 Cowens and Hill's Notes on Phillips' Ev., 541; 3 Monroe, 529, 531; 4 Barn. and Adol., 208.

2. That, as the plaintiffs proved the appointment of a statutory guardian, they must introduce the record of the proper court showing that appointment.—See 2 Cowen and Hill's Notes on Phillips' Ev., 541; 3 Monroe, 529; 4 Barn. and Adol., 208.

3. That in this case, as the plaintiffs have declared for an injury to their reversionary interest in the boat, created by a lease to Wear, that they must prove that the contract of lease was executed by Mrs. Parker, and further show that she was the guardian of the infants, Paulina and George Parker, by the record, at the time such lease was executed.—See authorities on first point.

4. That one tenant in common cannot dispose of the common property, so as to divest other tenants, without their assent.—See 21 Wendell, 72; 9 Cowen, 230.

SCOTT, J., *delivered the opinion of the Court.*

This was a proceeding under the statute concerning boats and vessels, instituted by the plaintiffs against the steamboat Little Red, in which the plaintiffs suffered a non-suit.

The plaintiffs in the cause are John Ward, Abraham Barnes, John Warnock, Paulina Parker and G.W. Parker. Paulina and G.W. Parker are infants, and sue by their guardian. The complaint alleges, that the plaintiffs were the owners of a ferry-boat, which they leased for one year to James F. Wear; that during the year for which said Wear rented said ferry-boat, the captain of the said steamboat Little Red contracted with the said Wear, the lessee, to transport the said ferry-boat from Nashville, in Boon county, to Rocheport, in said county, for the sum of forty dollars, and that in the performance of the said undertaking, the captain of said steamboat was guilty of such negligence as caused the loss of the said ferry-boat.

On the trial, a lease of the ferry-boat, executed by the three adult plaintiffs and Wear, the lessee, was given in evidence, after proof of the execution of the same.

It did not appear that the lease was executed by the infant plaintiffs, or their guardian.

The question presented by the record is, whether it was necessary to show a lease by the infant plaintiffs, or their guardian, in order to maintain the action? It was urged for the defendants, that the plaintiffs having alleged, as the cause of their action, an injury to their reversionary interest in the ferry-boat, it was necessary to prove such an interest, in order to sustain their demand. That the lease having been executed by only three of the plaintiffs, they alone had shown such an interest, and no reversion having been shown in the infant plaintiffs, there was a variance between the complaint and the evidence, which was fatal to the action.

It may be admitted, that the plaintiffs must show a reversionary interest in the ferry-boat, in order to maintain their action. (Chitty, 413.) It is not disputed but that the infants were part owners of the boat, and if they were such, the other part owners could not dispose of their interest. They were not partners with the other owners of the boat, and if joint tenants or tenants in common, their interest could not be conveyed but by themselves or guardian. It is a principle well established, that an infant cannot become a trespasser by relation, that is, his assent to a trespass, for his benefit, subsequent to its commission, will not make him a trespasser. (1 Coke, 180, note b.) But this doctrine has no relation to contracts, and an infant can become a party to a contract made without authority from him, by his subsequent adoption of it, as well as by his previous express consent. The subject-matter of the lease was not of such a character as required any writing to convey an interest in it. The lease could as well have been made by parol as by deed. If one illegally takes the horse of another, and disposes of it, the owner may treat the vendor as a trespasser, and recover from him the value, or he may affirm the act, and recover the price from the vendee. *Omnis rati habitio retro trahitur et mandato acquiparatur.* Suppose these infants had been adults, and had not executed the lease, and afterwards joined in this action, would it not have been held an affirmation of the contract of the other part owners? The same principle precisely applies to infants, if they affirm a contract; it is for them, and them alone, to say they are not bound. None but the infant himself can avoid his contracts. These infants might have disaffirmed the contract of lease, and regarded themselves as part owners with Wear. But by bringing this action, they have affirmed the contract of lease made by the three adult plaintiffs, and consequently properly described themselves as owners of a reversionary interest in the boat.

Judgment reversed.

HOWARD ET AL. vs. THE STATE.

1. Where a sheriff, after having given bond as collector, and after having been charged with the amount of the tax-book by him received, resigns his office, he is not thereby relieved from the obligation imposed by his bond as collector, but is bound to pay into the State treasury the amount of the tax-book charged against him, deducting the delinquent list, if any there be.
2. When the tax-books are delivered to the collector, and the amount thereof is charged against him on the books of the auditor of public accounts, the collector becomes responsible for the amount of the tax-books, and his resignation of his office will not affect that responsibility, whether he proceeds to collect the taxes or not.

APPEAL from Morgan Circuit Court.

HAYDEN, for Appellants.

1. By the demurrers filed to the pleas of defendants, the State admits, that Waid Howard, as sheriff, resigned his office of sheriff of the county, before the collection of the revenue, or any part thereof, and whilst the same was wholly due and unpaid, and that Joseph Taylor was duly commissioned and qualified as sheriff of the county, and, as such, was *ex-officio* collector, and did collect the State revenue for the year 1839, amounting to the said sum of \$317 75 cents, and converted the same to his own use, and that, therefore, the State of Missouri having duly appointed and commissioned him, Taylor, her collector *ex-officio*, ought not, and cannot charge him, said Howard, with said sum of money, collected at her own instance, and by her own appointed agent.

2. That, by the first section of the revenue law in the Digest of 1835, sheriffs are made *ex-officio* collectors of their respective counties, and upon the resignation of their offices as sheriffs, they cease to be collectors of their counties, and cease to be liable for the performance of the duties imposed upon them as such.

BAY, Attorney-General, for the State.

1. The entries in the books of the auditor of public accounts, against collectors of the revenue, are *prima facie* evidence of the indebtedness of such officers; the entries being made in public books, by a public officer, in the performance of a duty enjoined on him by law. (1 Phillips' Ev., 413-425; Renkendorf vs. Taylor's Lessee, 4 Peters' Rep., 349.) In this case, the official tax books of the corporation of the City of Washington, made up by the register, from the official returns of the assessors laid before the board of appeals, were held sufficient evidence to show the tax assessed upon an individual. The court remarked, that the book "was made out and arranged by an officer, in pursuance of a duty expressly enjoined by law. This not only makes the tax books evidence, but the best evidence which can be given of the facts it contains."—1 Starkie on Ev., 208-212; 4 Pick. Rep., 280; Moore vs. Bank of Missouri, 6 Mo. Rep., 379.

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2. By the first section of the second article of the act of 9th March, 1835, (Rev. Stat., 606,) the auditor of public accounts is declared to be the "general accountant," of the State, and the keeper of all public books, &c., relating to the accounts and contracts of the State, and its revenue, &c.; and by the fourth subdivision of the third section of the same article, it is made his duty "To audit, settle, and adjust the accounts of all collectors of the revenue," &c. By the 28th section of the third article of the act of 14th March, 1835, concerning the revenue, (Rev. Stat., 538,) it is provided, that "immediately after every settlement made by any collector with the County Court, a copy of the record thereof shall be certified and sent to the auditor of public accounts;" and by the 33d section of same article, it is made the duty of the collector to pay into the State Treasury "the whole amount of revenue with which he may stand charged;" the obvious meaning of which is, all the revenue with which he may stand charged upon the books of the auditor of public accounts.

For the foregoing reasons, the court properly overruled the demurrer to the second assignment of breaches.

3. The ninth section of the first article of the act concerning the treasury department (Rev. Stat., 1835, p. 606,) makes certified copies, &c., required to be kept in the auditor's office, *evidence* in the same manner, and with the like effect, as the originals. In *Gurno vs. Janis*, (6 Mo. Rep., 330,) this Court decided, that "whenever the law requires an officer to give a certificate of the existence of any fact, that the *certificate* so given is to be received in evidence of the existence of the fact."

If the *certificate* is evidence, then *à fortiori* is the *original* evidence, and the second assignment of breaches avers that defendant was charged, &c., upon the books of the auditor, &c.

4. The demurrer to the plea to the second assignment of breaches was properly sustained—

1st. Because the plea referred matter of law to the determination of the jury.—*Fugate and Young vs. Carter*, 6 Mo. Rep., 267; *Bennett vs. Martin*, 6 Mo. Rep., 460; *Newman vs. Lawless*, 6 Mo. Rep., 279.

2d. Because the plea does not state facts with sufficient certainty.—1 *Chitty's Plead.*, 271; *Thomas vs. Van Doren et al.*, 6 Mo. Rep., 201.

5. The demurrer to the last two pleas was properly sustained, because—

1st. The sheriff, by the resignation of his office of sheriff, does not thereby cease to be collector. Although the statute declares that the sheriff shall be *ex-officio* collector, yet the collectorship is not in the proper sense of the term an *ex-officio* office. The sheriff does not become collector until five months after his election as sheriff, and he continues to be collector for five months after his term of service, as sheriff, expires, so that, for a period of ten months, the sheriff is not collector, and the revenue is collected by a person who is not sheriff.—Rev. Stat., 1835, title, "Revenue," art. 2, sec. 1, p. 536.

2d. Even admitting that the sheriff, by the resignation of his office of sheriff, ceases to be collector, yet the pleas are bad, for the collector, upon the receipt of the tax-book, is charged with the whole amount due for taxes, which charge is

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certified to the auditor of public accounts, and the collector becomes liable for the amount due, which liability certainly cannot be avoided by the resignation of his office of sheriff, but only by payment into the State treasury of the amount charged against him, deducting, however, the amount of the delinquent list, if any there be.—Rev. Statutes, 1835, title, "Revenue," art. 3, sec. 8, 9, 10, p. 536, and revenue laws *passim*.

3d. If the collector, by a resignation of the office of sheriff, could avoid the payment of the amount of the tax book received by and charged against him, the whole amount thereof would be a loss to the State, as his successor in the office of sheriff would not be required to collect the amount of the tax book charged against the former collector, nor to make any settlement in relation thereto; nor would any charge appear against him, on account of such tax-book, either on the records of the County Court, or on the books of the auditor of public accounts.—*Ibid*.

6. Courts have always paid great deference to the contemporaneous construction of laws by officers whose duty it was to execute those laws; and the uniform construction given to the revenue laws by those officers has been directly the reverse of that contended for by the appellant.—*Contemporanea expositio est optima et fortissima in lege*: 2 Just., 11.

NAPTON, J., delivered the opinion of the Court.

This was an action brought by the State against the appellant, upon his official bond, as collector of the revenue in 1839. The first breach assigned in the declaration is, that defendant, as collector for the county of Morgan during the year 1839, received in payment of taxes due the State \$317 75, which he refused and neglected to pay into the State treasury. The second breach is, that the said Howard, as collector of the revenue within the county of Morgan for the year aforesaid, was, on the first day of December of said year, charged upon the books of the auditor of public accounts of said State, with the sum of \$317 75, as so much money by him received and collected during the year aforesaid, and being justly due and unpaid; and that said Howard has hitherto wholly neglected, &c.

The defendant pleaded, in answer to the second breach, that he was not rightfully and lawfully charged upon the auditor's books, &c. He further pleaded, in bar to the action, that on the 25th day of July, and before the collection of the State revenue, or any part thereof, due for said year, the said Howard, as sheriff and collector of said county, resigned his office, according to law; and had his resignation made known, in due form, to the then governor of this State, who thereupon, on the 30th day of July, and before the collection of the State revenue, or any part thereof, appointed one Joseph Taylor sheriff of said county, and commissioned and authorized said Taylor to exercise all the powers and duties appertaining to his said office of sheriff. The plea further averred, that said Taylor, so being commissioned as sheriff, took the prescribed oath of office, and entered into bond pursuant to law, and entered upon the duties of his office, and that said Taylor, as sheriff, by virtue of his office, &c., did collect all the revenue of said county for the year 1839, and converted the same to his own use.

It is not material to notice the other pleas which were filed, the disposition of which in no wise affects the merits of the question presented in the record. The attorney-general demurred to the above-recited pleas, the demurrer was sustained, and judgment given for the State on the demurrer.

The only important question presented by the pleadings is, whether the resignation of a sheriff, after he has given bond as collector, and the appointment of a successor, will relieve him from the obligations of his bond.

The sheriff is, by the act relating to the revenue, declared to be *ex-officio* collector; yet, in examining all the provisions of the same act, we find, that the offices are only so far inseparable, that before a person can be collector he must fill the office of sheriff. But the sheriff is not always the collector; nor is the collector necessarily the sheriff. From the first Monday in August until the first of January succeeding, the sheriff and collector are two different persons. The sheriff cannot, by the law as it was in 1835, under which this case was determined, assume the duties of collector until after the first of January; he continues in office as collector five months after the expiration of his office as sheriff. He gives bond as sheriff, and bond as collector, and the whole scope of the law indicates the intent of the legislature to impose on the sheriff the burthen of collecting the revenue, leaving at the same time the duties and liabilities, and term of service, of the two offices distinct and separate.

After the sheriff enters on the duties of collector of the revenue, the tax books are placed in his hands, and he gives a receipt for the same; the aggregate amount of the tax books is certified to the auditor of public accounts, and that amount is charged to the collector as so much money due and owing from him to the State. This account is *prima facie* evidence against the collector, and he can only discharge his liabilities by paying the amount into the treasury, deducting the amount of the delinquent list.

I do not doubt but that the collector may resign his office, as well as the sheriff, and that the sheriff, where he fills both offices, as he does during nineteen months of his term of service, may, by his resignation of the office of sheriff, relieve himself from the duties of collector.

But this privilege or right which may be considered applicable to all public offices, must not be exercised so as to affect injuriously the rights of the public. The resignation of the office of sheriff does not affect the liabilities of that officer on his official bond, nor will the resignation of the office of collector, when distinct from that of sheriff, or when united in the same person, release the incumbent from liabilities incurred.

When the tax books are delivered to the collector, and he receipts for the same, and the amount is charged against him at the proper department of State, the collector has become responsible for the taxes, and his resignation of that office will not affect that responsibility, whether he proceeds to collect them or not. No provision is made in our law, by which his successor is required to give bond for the taxes of that year; nor does any charge appear against that successor in the office of the auditor, and the collector who has receipted for the taxes is responsible, or they are a loss to the State.

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This is like the case of a sheriff who commences on a particular duty, and before the completion of that duty resigns his office, or his term expires. Upon common law principles, and apart from any specific regulations of our statutes, the sheriff was authorized to complete the act thus commenced, and he was, of course, responsible if such act was not completed or not legally performed.—*Cooper vs. Chitty*, 1 Black. Rep.; 2 Lord Raymond, 1072.

The collection of the revenue due in any specified year is one entire act, and is incapable of subdivision; for it is apparent, that no means are provided by which it could be ascertained what portion was collected by one and what by another. The existence of two different collectors during the same year is therefore not contemplated by our statutes.

If the collector, previous to giving bond, resigns, the difficulty does not arise; and if subsequently to giving bond, and previous to his acceptance of the tax lists, or doing any act towards the collection of the revenue, he resigns, he cannot be held responsible for the performance of a duty not undertaken or commenced. But the plea of defendant does not make out such a special case; it avers generally, that before the collection of the State revenue, or any part thereof, the defendant resigned, &c. This was no answer to the declaration, and we are, therefore, of opinion, that the judgment of the Circuit Court upon the demurrer was right.

Judgment affirmed.

ROBINSON vs. CAMPBELL.

A mortgagee of personal property is, after the day of redemption is passed, regarded in law as the absolute owner, and may dispose of the property in any manner he pleases.

APPEAL from Cole Circuit Court.

HAYDEN and MINOR, for Appellant.

1. The sale of the slave in controversy, at the time, place, and under the circumstances of the case, by Richard Morris to W. Robinson, the plaintiff below, was a valid sale, and vested the plaintiff with an absolute and unqualified right of property in the said slave, and the court erred in giving to the jury the instruction which it gave upon the motion of the defendant, Campbell.—4 Kent's Com., 138; 12 Wendell, 61; 8 Johnson, 96; 2 Atkins, 317; 2 Johns. Ch. Rep, 97; Story's Equity; 9 Wendell, 80, 258; 11 *Ibid.*, 106; 7 Cowen, 290; 1 P. Williams, 261.

2. The court erred in not setting aside the non-suit, and granting to the plaintiff a new trial of the cause, for the reasons exhibited in his motion in the Circuit Court.

Robinson vs. Campbell.

KIRTLEY and MILLER, for Appellee.

We insist the judgment was rightfully given for the defendant, and that the Circuit Court committed no error for which this Court should reverse its judgment, and rely on the following authorities.—1 P. Williams' Rep., 261, *Tucker vs. Wilson*; 4 Mon. Rep., 345, *Wilkins' Administrator vs. Sears*; Statutes of Missouri, 1835, p. 409, title, "Mortgage;" 7 Mo. Rep., 556, *Williams vs. Rover*; *Ibid.*, *Desloge vs. Ranger*, 326; 1 Chitty's Plead., 178, 9; 8 Law Library, Coote on Mortgages, 309; 1 Vesey, senior, 278, *Kemp vs. Westbrook*; 1 Tucker's Com., 105.

NAPTON, J., delivered the opinion of the Court.

This was an action of trover, brought by the plaintiff in error to recover the value of a negro girl named Maria.

It appears from the record, that on the 14th January, 1839, the defendant executed to one Richard Morris a deed for said slave, upon consideration of \$366 52 to him paid, upon condition that if the defendant should, on or before the 25th December following, pay to said Morris the said sum of \$366 52, then the right and title to said slave was to return and vest in said Campbell.

On the 7th July, 1740, Morris addressed a note to Campbell, informing him that unless the money due on said instrument, with interest, was paid, he would, at the town of Russellville, on a day named, expose to sale said slave, and hold him responsible for any deficiency, should said slave sell for less than the mortgaged debt. It was proved that the sale took place at Russellville, on the day specified, (notice of the same having been published in a newspaper printed in Cole county, six weeks previous to the sale,) and that the plaintiff became the purchaser for the sum of sixty-one dollars.

It was also proved that the slave Maria was in possession of defendant at the commencement of this suit, and that she was worth three hundred dollars.

The defendant, at the close of the testimony, moved the court to instruct the jury to find against the plaintiff, as in the case of a non-suit. The court thereupon instructed the jury—

1. That in this case the plaintiff had shown no title to the property, under the sale by the mortgagee, at the time and in the manner as proven by the evidence; and,

2. That the mortgagee had no right to sell the slave in the manner he had sold her to the plaintiff, and that to make the sale valid, it should have been under a judicial decree foreclosing the equity of redemption.

The plaintiff excepted to these instructions, submitted to a non-suit, and moved to set it aside. The motion was overruled, and the plaintiff appealed.

We are not apprized of any principle upon which the instructions of the Circuit Court can be sustained. It is well settled that a mortgagee of personal chattels, after the day of redemption has passed, is regarded in law as the absolute owner. (4 Kent's Com., 138; 7 Mo. Rep., *Williams vs. Rover*, p. 556.) No reason is suggested why the mortgagee should not dispose of his title in such mode as he

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pleases, and no question relative to the equity of redemption is involved in this suit.

It seems probable, from the course of the argument, as well as from the character of the instructions, that the Circuit Court only intended to decide that the equity of redemption was not barred by this sale; but as the question does not arise in this action, it is deemed improper to express any opinion on this point.

It has been suggested that this judgment may be affirmed, on the ground, that there was no evidence of a demand and refusal, and that therefore the court properly instructed the jury to find as in case of a non-suit; but as it is obvious from the record that the court refused to instruct the jury to that effect, but placed the verdict upon the ground of the insufficiency of the plaintiff's title, and the question of demand and refusal was not passed upon by that court, the judgment must be reversed, and the cause remanded.

LAUGHLIN ET AL. vs. FAIRBANKS AND LISLE & EDWARDS.

1. It is well settled, that courts of law will protect the rights of assignees of a chose in action against all persons having notice of such assignment, express or implied. Therefore, where a judgment debtor, with notice of the assignment of the judgment to a third person, pays the amount thereof to the judgment creditor, it will be no discharge of the judgment.
2. Where a judgment had been assigned, and the debtors, with notice of such assignment, paid the amount to the judgment creditor, and procured from him a receipt for the same, and thereupon the judgment creditor made an endorsement on the execution, directing the sheriff to return the same satisfied; it was held, that such endorsement might be vacated on motion, and a new execution issued for the benefit of the assignees of the judgment. But before such order could be made, all the judgment debtors were entitled to notice of such motion.

ERROR to Miller Circuit Court.

MINOR and MILLER, for Plaintiffs.

The plaintiffs in error insist—

1. That they cannot be brought into court by motion (without notice) and be made to answer in damages to any one who may claim to be the assignee of their judgment creditor; the office of a motion being merely to obtain a rule or order in the progress of a cause.—3 Bl. Com., side-page, 304; 1 Call, 476; 4 H. & M., 276.

2. The plaintiffs insist that there was error in vacating and setting aside the order endorsed on said execution: and that the judgment against only two of the plaintiffs in error, for costs, omitting to notice the other three, is error.

3. There is no fraud charged or proven against the plaintiffs in error, nor is it shown that they had notice of the assignment. The filing of the assignment in the

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clerk's office imparted no notice. The testimony of witnesses, Parkam and Maugis, does not prove notice of an assignment; all that Parkam says in relation to the notice is, that "he heard Lisle say to Laughlin, that he, Lisle, and the said Edwards, were to have each a third of the judgment." Maugis says, that "he heard Laughlin say that Lisle had told him (Laughlin) that he, Lisle, was to have one-third of the damages, and that Edwards was to have another third; but that Laughlin disclaimed any knowledge of the assignment."

4. The claim of the said Lisle & Edwards being a chose in action by virtue of an assignment, and such as they are authorized to proceed on in their own name, the proceeding should have been in the name of the assignees.

5. The assignment is not to Edwards & Lisle, but to each a separate and distinct part or interest; but if this is not so, still it is clearly shown that only "part and parcel" of the judgment is assigned. The plaintiffs in error are, therefore, not chargeable, unless it is made to appear that they assented at the time, or subsequently to the transaction.—Chitty on Contracts, p. 611, note 1, and authorities there cited.

6. The plaintiffs in error rely upon their receipt offered by them in evidence, and insist that the motion ought to have been refused.

7. Questions of fact as well as law being involved in the controversy, the proceeding should have been such as to afford either party the privilege of a jury.

8. For aught that appears in this record, the payment to Fairbanks became necessary to save the property of the plaintiffs in error from sale, and one of them from imprisonment; and they insist, that if proper payments have been made, it is the fault of the defendants in error.

LISLE and EDWARDS, for Defendant.

1. A chose in action may be assigned by parol, or by writing not under seal. If the plaintiffs in error knew that a part of said judgment belonged to the defendants in error, or that they were "each to have a part of the judgment," it was sufficient notice to them whether they understood that there had been a written assignment of the judgment or not.—19 Johns. Rep., 95 and 344; 5 Johns. Rep., 193; 3 Johns. Rep., 425.

2. Courts of law will protect the interest of assignees of choses in action. Where full relief can be given in a court of law, the parties will not be driven to a court of chancery for remedy.

3. The court did not permit improper or illegal testimony to be given.

4. The finding of the court was not against the evidence. It is the province of the jury, or the Circuit Court when sitting as a jury, to determine what weight is due and ought to be given to the testimony of a witness. Much depends on the manner in which a witness testifies; his tones—his gestures—the apparent willingness or unwillingness with which he gives his testimony for or against a particular party, all tend to fix the character of his evidence; and this Court will not reverse the judgment of the Circuit Court because the judgment is against the evidence, unless a flagrant case is made out.—5 Mo. Rep., 522, 525, Lackey vs.

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Lane & McCabe, 7 Mo. Rep., 220; Rennick vs. Walton, 7 Mo. Rep., 292; Campbell & Mason vs. Hood, 6 Mo. Rep., 211.

5. It is a settled rule of law that courts of law will regard the assignment of choses in action, and protect their interest against any person having notice, or who is bound to take notice, of the assignment. — *Ells vs. Finch*, 5 Johns., 193; 1 Johns. Cases, 51, 2.

6. The assignee of a chose in action will be protected against the release of his assignor, after notice of his assignment to the debtor. — *Wheeler vs. Wheeler*, 9 Cowen's Rep., 34; *Pattison vs. Hall*, 9 Cowen's Rep., 747.

7. A release by the assignor of a chose in action, after notice of assignment to the debtor, is a mere nullity. — See authorities cited to last point.

8. Where the plaintiff in a judgment assigned the same, and after the assignment, and notice of the assignment given to the debtor, the assignor released the same, the court declared the release fraudulent, and on motion vacated the order of satisfaction, and ordered a *feri facias* in favor of the assignee. — *Wardell & Eden*, 2 Johns. Cases, 121, 258, 62.

9. The Circuit Court has full power and authority to issue all writs which may be necessary to carry out the orders and decrees of the same. — Revised Code 1835, p. 158, sec. 33.

10. That the receipt given by Fairbanks to Laughlin and Wilson was given for the purpose of defrauding Lisle & Edwards, and is therefore void.

NAPTON, J., delivered the opinion of the Court.

At the December term, 1842, of the Miller Circuit Court, W. S. Fairbanks obtained a judgment against John M. Laughlin, Michael Wilson and Others, for thirteen hundred and seventy-five dollars. At the July term succeeding, Lisle & Edwards, assignees of two-thirds of the judgment in the above cause, filed a motion to set aside and vacate an order or receipt entered on the execution issued on each judgment, to the sheriff of Johnson county, directing said sheriff to return the execution satisfied; and demanding an alias execution for their portion of the judgment. They assigned as reasons for vacating this endorsement, that previous thereto, Fairbanks had assigned a part of said judgment to Lisle & Edwards, of which assignment defendants had notice; that said receipt was given for the purpose of defrauding said Lisle & Edwards, and that \$916 66, part of said judgment, was yet unpaid.

Objections were made to the hearing of this motion, on the ground that all the defendants were not made parties; that no notice of the motion had been given, either to Laughlin and Wilson, (who appeared by attorney and made these objections,) or to any of the other defendants.

The court overruled the objections, and the motion was entertained. On the hearing, the precept of Lisle & Edwards, attornies for the plaintiff, Fairbanks, to the clerk of the Miller Circuit Court, was read, directing the clerk to issue an execution to Johnson county, with a *capias* against Tibbetts, (one of the defendants,) and to deliver the execution and *capias* to John M. Laughlin or Michael

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Wilson or order. The execution was also read, upon which there was the following endorsement:—

"The sheriff of Johnson county will return the within execution with the principal fully satisfied; that is, with a credit of thirteen hundred and seventy-five dollars, which I have received from John M. Laughlin and Michael Wilson, two of the defendants, this 27th December, 1842. W. S. FAIRBANKS."

The assignment of two-thirds of the judgment obtained by Fairbanks *vs.* Wilson, Laughlin and Others was also produced. The assignment was in writing, under seal, and purported to transfer to the said Lisle & Edwards, each, one-third of said judgment. The assignment was dated 7th December, 1842.

A witness was introduced, on the part of the plaintiffs, in the motion who testified, that at the term of the Miller Circuit Court, after the rendition of the judgment in the case of Fairbanks *vs.* Laughlin, Wilson and Others, B. M. Lisle, one of the plaintiffs in said motion, said to Laughlin, that he, Lisle, and the said Edwards were to have each a third of the judgment, and that, for his part, he would give ten or twenty years, and he would try and get Edwards to give time; and that Fairbanks would take a wagon for his part, &c. Witness did not know that Wilson heard this conversation; that Lisle spoke in an ordinary tone of voice, and that Wilson and others were in the crowd, near at hand.

Another witness, on behalf of plaintiffs, testified, that he had paid over in property and money, about six hundred and fifty dollars to Fairbanks, by the direction of Laughlin and Wilson.

A third witness testified, that he has heard Laughlin say, that Lisle was to have one-third of the damages, and Edwards was to have one-third. Same witness heard Laughlin say, after the date of the return on the execution, that if Lisle and Edwards had an assignment of the judgment, he knew nothing of it.

The defendants, Wilson and Laughlin, produced on their part a receipt from Fairbanks, for the full amount of the judgment, dated the same day with the endorsement on the execution, and to the like effect.

The court, after hearing the evidence, made an order, vacating and setting aside the endorsement on the execution to the extent of nine hundred and sixteen dollars (being two-thirds of the judgment,) and directing an alias execution against the defendants for that amount, with an endorsement that it was for the benefit of said Lisle and Edwards.

To these proceedings, exceptions were duly taken, a new hearing demanded, which was overruled, and the cause is brought here by writ of error.

It is urged by the plaintiffs in error, that this motion, involving as it did questions of both law and fact, was improperly entertained; that the rights of the defendants in the execution should not be affected by such summary proceedings, and especially without notice to the parties interested; that the proofs of the notice of the assignment were insufficient to warrant the order of the court, and admitting that to be a question about which, upon the evidence, doubts might be entertained, they were entitled to a trial by jury, on issues to be directed by the court.

We entertain no doubt that a motion was a proper and legal mode to effect the object desired by the plaintiffs in the motion; but we are equally well satisfied

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that the defendants in the judgment were entitled to a notice of such motion. When a motion is made in the progress of a cause, the parties are presumed to be in court, and only such notice is required as the rules of the court prescribe. No such presumption can arise after the case is disposed of; the parties cannot be supposed to take cognizance of steps taken in a cause, after the judgment has been signed, execution awarded, and ordered to be returned satisfied by the defendants. In every case, therefore, of a special motion, unless there has been an express or implied waiver of notice, the want of such notice would of itself be sufficient to vitiate the proceedings:—*Brown vs. Bendrick*, 18 Wendell, 511.

In this case the motion was made and entertained at the return term of the writ, without any notice to either of the defendants. It is true, that so far as two of the defendants were concerned, they appeared by attorney, and resisted the motion; and if the other defendants were no wise interested in the motion, it might be a question whether their appearance would not be construed as a waiver of notice, notwithstanding they objected to the hearing on this ground. Had the defendants who appeared applied for a continuance, they would unquestionably have been entitled to one. Had the court made the rule *nisi*, giving the defendants an opportunity of afterwards showing cause why it should not be made absolute, the proceedings of the court would have been more regular, and the objection on the part of the defendants, Wilson and Laughlin, would have less weight.

But all the defendants were entitled to notice. Here was a judgment in trespass against five defendants. A receipt in full is executed by the plaintiff, and this receipt is sought to be set aside, on motion, on the ground that it was fraudulent and void against the assignees of this judgment. Can it be doubted that the three defendants, who had paid nothing, were interested in the result of this motion, and must necessarily be parties to it? There is no contribution between co-trespassers, and if one of the defendants paid the whole judgment, the others were entitled to the benefit of that payment. A release to one would be a release to all. (*Merriwether vs. Nixon*, 8 Tennessee Rep., 186; *Lingard vs. Bromley*, 1 Vesey & Beame, 117; *Peck vs. Ellis*, 2 Johns. Chan. Rep., 136.) And this rule prevails in equity as well as at law. (*Peck vs. Ellis*, 2 Johns. Chan. Rep., 137.) If the motion prevailed, execution would issue against all the defendants; if not, they were discharged. The proceedings on the motion, therefore, so far as three defendants are concerned, were *ex parte*, and yet their interests were affected by the rule which was entered, so much so, that the *vacatur* of the endorsement on the execution made each of them liable for the full amount of the judgment unpaid.

With regard to the principles upon which the court acted, in determining the rights of the parties, the law seems now to be well settled, that courts of law will protect the rights of assignees to a chose in action, without requiring a party to resort to a court of equity, against all persons having notice of such assignment, either express or implied.—*Wardell vs. Eden*, 2 Caine's Ca., 126, 258; 1 Johns. Rep., 531; 3 *Ibid.*, 426; *Briggs vs. Dorr*, 18 *Ibid.*, 97.

To authorize the action of the court in entering the *vacatur*, it must have been satisfied, from the testimony, that Wilson & Laughlin made their payments on this judgment, after notice of the assignment to Lisle & Edwards.

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In reviewing the evidence on this point, it must be observed, that this is not like a verdict of a jury, or the finding of a court sitting as a jury. It is rather the exercise of an equitable jurisdiction assumed by courts of law, and admitted to be rightfully assumed where a suitable case presents itself. The record must present a state of facts, warranting the exercise of this power, and all the evidence being preserved in the bill of exceptions, this Court may enquire into the sufficiency of this evidence, without infringing upon the rules which govern us in the re-examination of the verdicts of juries, or of courts assuming the province of juries.

In proceedings of this kind, where a court of law is called upon to exercise a summary jurisdiction, it might, with propriety, decline any interference, where questions of fact were presented, about which the evidence is variant or unsatisfactory. In such cases, it is usual and proper to direct issues to try the questions of fact, and the court is relieved from the necessity of determining upon the weight of testimony or the credibility of witnesses.

We incline to think, that the testimony was sufficient to authorize the conclusion that Laughlin, one of the defendants, had notice of this assignment. The observation of one of the plaintiffs in the motion, that "he, Lisle, and the said Edwards, were to have each a third of the judgment," would of itself be hardly sufficient to advise Laughlin, to whom the conversation was addressed, that there had been an assignment of this judgment; but his subsequent remarks, that, "for his part, he would give ten or twenty years," &c., would seem sufficient to apprise him, that he had a control over the judgment, and rebut the influence which perhaps might be made from the preceding observations, that he looked to Fairbanks for his share of the judgment, after it was collected. But how is this declaration to affect Wilson? It nowhere appears, that Wilson and Laughlin were partners; in which event notice to one would be sufficient. And it can hardly be claimed, that the circumstance of Wilson's being in the crowd, where this observation was made, without any proof as to the probability of his being in a situation to hear the conversation between Lisle and Laughlin, would of itself affect him with notice.

We are aware that there may have been circumstances, trivial in themselves, which, connected with all the facts of the case, might authorize a belief, that both Wilson and Laughlin knew of this assignment; but as has been before observed, in a proceeding of this kind, a court should not act on a questionable state of facts.

The case of *Wardell vs. Eden*, which has been relied on to sustain the rule entered by the Circuit Court, will illustrate this principle. In that case, notice of the motion had been served on the attorney of the defendant, and on the defendant himself, previous to the hearing; the notice of the assignment was in writing, and had been served on the defendant the day before the payments were made; and yet, on this state of facts, where every thing was susceptible of *positive* proof and was so established, a rule *nisi* only was entered, and that rule was not made absolute until the succeeding term.

Upon the whole, then, we are of opinion, that the court entertained this motion without the requisite notice to the defendants in the execution, and that there was not sufficient evidence of a notice of this assignment to Michael Wilson, one of the

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defendants, to authorize the court to settle the rights of these parties in a summary proceeding by motion, and the judgment of the court, vacating the endorsement on the execution, is therefore reversed.

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A disclosure, by a grand juror, of the names of witnesses who testified before the jury, and the fact that they did testify, and the subject-matter about which they testified, is not an offence within the provisions of the seventeenth section of the fourth article of the act concerning practice and proceedings in criminal cases.

APPEAL from Morgan Circuit Court.

NAPTON, J., *delivered the opinion of the Court.*

At the March term, 1841, of the Circuit Court for the county of Morgan, an indictment was found against John Brewer, for misdemeanor, under the seventeenth section of the third article of the act concerning practice and proceedings in criminal cases. That section provides, that "no grand juror shall disclose any evidence given before the grand jury, except when lawfully required to testify as a witness in relation thereto, nor shall he disclose the fact of any indictment having been found against any person for a felony, not in actual confinement, until the defendant shall have been arrested thereon. Any juror violating the provisions of this section, shall be deemed guilty of a misdemeanor."

The indictment averred, that Brewer was a member of the grand jury, sworn and charged, and that it was his duty, as such, not to disclose any evidence given before the grand jury, except when lawfully required, &c.; yet that said Brewer, not regarding his duty in that behalf, on, &c., at, &c., did verbally disclose to one David Ray, that a certain Robert Shaw and a certain E. Clark had given testimony before the grand jury, of which he, said Brewer, was a member, against one J. L. C., for keeping open the grocery of him, the said J. L. C., on Sunday, a bill of indictment being then and there found against the said J. L. C., for keeping open his grocery on Sunday, and he, the said J. L. C., not being then and there arrested, contrary, &c.

This indictment, upon motion, was quashed, and the only question here is, as to its sufficiency.

The statute prohibits two offences; first, disclosing evidence given before the grand jury; and, second, disclosing the fact that an indictment has been found, for a felony, under certain circumstances. The last part of this indictment, reciting, that a bill of indictment was found, and defendant not arrested, is surplusage, as that relates to an offence of which this defendant is not charged.

The defendant is here charged, that he disclosed the fact that two persons, naming them, had given testimony before the grand jury against one J. L. C., for

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keeping open his grocery on Sunday. It would be allowing great latitude in criminal pleadings to hold that this is a distinct and clear averment that the defendant disclosed evidence given before the grand jury.

There is no averment in the indictment, that Shaw and Clark, the two witnesses, did appear and testify before the grand jury, nor is there a sufficient averment that the defendant disclosed their evidence. The charge is merely that defendant disclosed the fact that these witnesses did appear, and the subject-matter for or about which they testified. The character, or substance, of their evidence is not alluded to, unless by implication.

No doubt the offence described is within the mischief of the law. To disclose the fact that certain persons have appeared and testified before the grand jury, in relation to a criminal charge, is an offence quite as heinous and as worthy of the notice of the law makers, as the two offences which are specified. But, as was well observed by Judge Marshall, in the case of *United States vs. Wiltberger*, (5 Wheaton,) "it would be dangerous to carry the principle, that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those that are enumerated."

To determine that a case is within the intention of a statute, we must look to its language. There is nothing in the words of the act under which this indictment was drawn, which would lead to the conclusion that a disclosure of the names of witnesses, and the fact that they did testify, and the subject-matter about which they testified, was designed to be punished, and it is only because we know that such disclosures are as injurious to the interests of society as those which are enumerated, that we suppose them to be within the reason or mischief of the statute.

We are therefore of opinion, that the indictment was properly quashed.

Judgment affirmed.

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1. A. sold to B. a certain tract of land, and executed his bond for a conveyance. B., at the time of the purchase, promised to pay A. a part of the consideration in a day or two. In the mean time B. purchased from one H. certain notes held by him on A., who was reputed to be insolvent, and tendered these notes to A. in payment of such part of the purchase money. At the time of the purchase, B. purposely avoided saying anything to A. as to manner of making the payment, and left upon his mind the impression that he was to receive the remaining part of the consideration in money. In a suit in chancery for a specific performance of the contract, brought by B. against A., the court held, that the notes were not a good tender of such remaining part of the purchase money.
2. A specific performance of a contract is not a matter of course, but rests entirely in the discretion of the court, upon a view of all the circumstances of the case. If there has been any unfairness or want of good faith, or improper conduct of any kind, on the part of the party asking the aid of the court, a specific performance will not be decreed.

APPEAL from Saline Circuit Court.—In Chancery.

HAYDEN, for Appellants.

1. The court permitted the complainant, upon the hearing of the cause, to read and give irrelevant and incompetent proof.

2. The finding of the facts, by the court, was against the evidence.

3. The decree of the court is against equity, and is not warranted by the evidence.

1st. The complainant has laid no foundation in his original or amended bills of complaint to warrant the reading of the paper writing, which he read as and for the will of Elijah Hook.—He has not stated in his bill that said Elijah made a will, nor has he made an exhibit of a will in the bill of complaint; nor stated a reason or cause why, if there be a will, he did not produce it as an exhibit; nor, in fact, has he stated, that the said Elijah devised by will the land mentioned in the bill. Therefore, the paper-writing read as a will was foreign to the facts charged in the bill.—See twenty-first section of the statute, Practice in Chancery, p. 510, of the Digest of 1835; 1 Wheeler's Digest, 320; 1 Bibb, 173; 1 A. R. Marsh, 325.

2d. The answer of Richard Durrett not having been replied to by complainant, stands admitted and is conclusive, and therefore the evidence of Thomas, so far as it may appear to contradict his answer, is to be wholly disregarded. (1 Wheeler's Ch. Digest, 341; 2 Cowen, 711; 1 Bibb, 277; 2 Cowen, 118.) But even if the answer of Richard Durrett were denied by replication, so as to make it proper for the court to look into the evidence of Thomas, the court will perceive, that the demand spoken of by the witness was not a demand of a deed for *the tracts* of land mentioned in the bill of complaint, but was a demand of a deed of conveyance for *a tract* of land stated by the witness as having been purchased by said Richard Durrett of said Clark, whereas, the complainant, in his own bill, does not pretend, that the purchase of the land was made by Richard Durrett, but that it was made by Benjamin L. Durrett of said Clark, so that his evidence is inapposite and irrelevant to the cause; but, as a matter of course, it cannot be looked into as against the defendant, Richard Durrett.

3d. The decree is against equity, and not warranted by the proofs in the cause.

In the first place, it is most manifest, from the answers of defendants, and proofs, that complainant has no claim to the decree against Richard Durrett, for, by the answer of him, R. Durrett, which is to be regarded as true, the complainant has not complied with the contract made by McAlexander with defendants, nor did the said McAlexander, his assignor. And it is equally clear, that the decree against the defendant, Benjamin, is unwarranted —

First: Because the contract was by parol, and the bond for title was not delivered to McAlexander by Richard Durrett, with the assent of said Benjamin L. Durrett, but on the contrary, it was taken by McAlexander from the table of Richard Durrett, without his consent: but had it been taken *with the consent* of R. Durrett, it

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would not have amounted to a delivery, binding on Benjamin L., because Benjamin L. expressly limited the agency of Richard Durrett to the preparing and signing the bond, *under positive directions* to him not to deliver it, but to keep it to be delivered by him, Benjamin L. Durrett, *himself*, to McAlexander.

Second: If the bond had been delivered by the authority of Benjamin, the contract was not complied with by McAlexander; but, on the contrary, a studied system of unfairness, as well in obtaining the consent of Benjamin verbally, to sell the land, as also to violate it on the part of McAlexander, and of which the complainant was fully advised and had notice. A system of conduct wholly and utterly irreconcilable with the principles of good faith and honesty, and such as to deprive the complainant of all claims to the assistance of a court of chancery to compel a specific performance of the contract.—See the following authorities:—6 Johns. Chan. Rep., 222, *et seq.*, Seymour vs. Delancy, and the authorities there cited.

S. M. BAY, *also, for Appellants.*

1. The specific execution of a contract in equity, is matter not of absolute right in the party, but of sound discretion in the court, and this discretion must be exercised according to the general rules and principles of courts of chancery. (See 2 Story's Eq. Jurisprudence, pp. 39, 47, 53, 79, 81; 1 Sugden on Vendors, 247; Seymour vs. Delancey, 6 Johns. Chan. Rep., 222.) In this case, Chancellor Kent remarks, "It is a settled principle, that a specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the court, upon a view of all the circumstances."—2 Bibb, 78; 11 Peters, 229.

2. Unless the agreement is fair and just in all its parts, and equitable under all the circumstances, courts of equity will not decree specific performance, but will leave the party to his remedy at law.—*Ibid.*

In Baxter vs. Lister, 3 Atk., 385, Lord Hardwick remarked, that nothing was better established in chancery, than that every agreement or contract of sale ought to be *certain, fair, and just in all its parts*, and if any of those ingredients were wanting in the case, the court would not decree a specific performance.—10 Vesey, 292; 18 *Ibid.*, 10; 4 Peters, 328.

3. In this case, it is evident, that there was a design on the part of McAlexander, complainant's vendor, and complainant, to overreach and mislead the defendant Benjamin, by leaving upon his mind the impression that he was to receive a part of the consideration in money.

The conduct of McAlexander throughout the whole transaction was unfair and unjust, and such as no honest man would have resorted to. He expressly declares that he agreed to pay the balance of the purchase money in a day or two, and that at the time of the purchase, he *purposely avoided* saying any thing about making payment in notes on the defendant, Benjamin.

4. Admitting, that the agreement was such a one as a court of equity would compel the parties to specifically perform, yet the decree of the Circuit Court essentially changes the terms of the agreement, by permitting the complainant to

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credit a part of the consideration of the land, on the bond of the defendant, Benjamin, to complainant. Instead of decreeing the specific performance of the agreement between McAlexander and Benjamin Durrett, the court has decreed the execution of that which never was the agreement of the parties.

TODD, *for Appellee.*

1. The offer to pay Benjamin L. Durrett the sum of \$280 which McAlexander owed him on the purchase of the land, in Durrett's own notes then due, without any pretended offset, is a good payment.

2. The facts and circumstances do not disclose any fraud in procuring the contract of sale from Durrett, by not disclosing a projected engagement to purchase his notes to make the payment.

3. By the will of E. Hook, the complainant is devisee of this contract; and it is no objection to the will, that it was a joint testament, for the benefit of the survivor.

4. Offer is fully proved of the payment of the last instalments, as no objection was made at the time; but the party need not tender, when he is informed that it would be unavailing.—6 Litt. Cases, 204.

5. The statute of frauds does not protect Benjamin Durrett, who holds *an equity only*, and he procuring and assenting to the sale of the legal title.

6. That McAlexander, the assignor of the title bond, is a competent witness, being released in full of the liability by the assignment; and his being a party in the suit is formal only.

7. If both parties are in default, neither can take advantage of non-performance.—4 Bibb, 413.

8. Benjamin L. Durrett, the holder of an equity, encouraging McAlexander to buy the legal estate, cannot set it up against Hook, and is not within the statute of frauds.—2 Sugden on Vendors, 299; 1 Johns. Chan. Rep., 354; 3 Litt., 55.

TOMPKINS, *J., delivered the opinion of the Court.*

On the eleventh day of June, in the year 1838, William Hook commenced this suit against Richard Durrett and Edmund McAlexander, in the Circuit Court of Saline county, on the chancery side thereof. In his bill he states, that on the 25th day of October, 1834, Richard Durrett made and executed to Edmund McAlexander his writing obligatory, by which he bound himself to execute and make to said McAlexander a good and lawful deed to a certain tract of land in said county, containing one hundred and twenty acres; and that, for a good and valuable consideration paid by Elijah Hook and William Hook, the complainant, the said McAlexander assigned to them the said writing obligatory; and the said conveyance having to be made by the said Richard Durrett on demand, and Elijah Hook, one of the assignees thereof, having departed this life on the first day of July, 1835, the complainant, William, on the first day of January, 1838, demanded of the said Durrett a deed for the same, according to the terms of the said writing, and the said Durrett refused to make the same, &c.

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The complainant further alleges, that he is sole devisee and executor of the said Elijah Hook, and that the said Richard Durrett, by said writing obligatory, admitted, that he had been fully paid for the said land by the said McAlexander; and the complainant states, that the same is true, or that, if he has not, it has been by the fault, negligence or consent of the said Durrett, and by his connivance, to form a pretext for not conveying to the complainant. The bill concludes in the usual manner, praying that the defendant be caused to answer, to convey, &c., and that McAlexander also answer, &c.

Richard Durrett answered, praying that Benjamin L. Durrett be made a party to the bill of the complainant, and stated, that the land mentioned in the bill was purchased by him, from one Richard Clark, for the consideration of four hundred and ten dollars; two hundred dollars of which said Benjamin paid to said Clark in cash, and executed his two notes, with this defendant as security, for the remaining part of two hundred and ten dollars, to said Clark, with the respondent Richard as his security; that, to secure himself from sustaining any loss by being security as aforesaid, the respondent took the deed of conveyance of said land from Clark to himself, but permitting said Benjamin, the beneficial owner of the land, to dispose of it at his pleasure; that said Benjamin did afterwards, as the defendant was informed, and as he expected to be able to prove, on the 25th day of October, 1834, contract to convey the said land to one Edmund McAlexander, for the sum of four hundred and ninety dollars, two hundred and eighty dollars of which he promised to pay to said Benjamin in a few days, and for the remaining sum of two hundred and ten dollars, (for which the respondent was still bound to said Clark as security, as aforesaid,) said McAlexander gave his notes to this respondent, with William Hook as security; but the respondent states, that after the said McAlexander obtained the bond for a title as above-mentioned, and giving his notes as aforesaid to this respondent, he failed to comply with his contract to pay to said Benjamin the said sum of two hundred and eighty dollars, and refused to pay the same, and refused to deliver up the title bond which he had obtained under false pretences as aforesaid.

In an amended answer, the defendant, Richard, admits the execution of the title bond, and states, that the two notes executed to him by McAlexander, and the complainant, Hook, as his security, were due at the same time those executed by him as security for Benjamin L. Durrett, and were to become due to Richard Clark, and that McAlexander promised to pay them when so due, and deliver them to the respondent. The respondent, Richard, in his amended answer, further stated, that said Benjamin L. Durrett and McAlexander came together to his house, to inform him of the contract for the sale and purchase of this land, and that said Benjamin did not remain there until the bond for the title to the land was executed by the respondent; but went home and instructed the respondent not to deliver the said writing to said McAlexander, but to keep it for him, said Benjamin, and that he would himself deliver it, whenever McAlexander should pay him the said sum of two hundred and eighty dollars; that, after the departure of said Benjamin, said McAlexander drew said writing obligatory, and that this respondent did then sign

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and seal the same, and lay it on the table, not intending to deliver it to said McAlexander, but that McAlexander, about the time he was going to leave the respondent's house, without the respondent's leave, took the writing and carried it away with him; he admits, that he did not forbid him, or say any thing to him at the time, but refrained, believing that McAlexander would fulfil his promise, and also from motives of delicacy. The answer concludes with a denial of any payment being made either by Hook or McAlexander to Benjamin L. Durrett, of the sum of two hundred and eighty dollars, or to Richard Clark or to the respondent, of the sum of two hundred and ten dollars, for which the respondent stood bound to Clark as security for Benjamin L. Durrett as aforesaid, for a part of the consideration of the land.

On the 22d of February, 1840, the complainant filed in this cause an amended bill, making Benjamin L. Durrett co-defendant to the bill of complaint. In this amended bill he states, that said Benjamin L. Durrett, at the time of the purchase of the said land in the original bill mentioned, from Richard Durrett, by McAlexander, was the owner of the said land, and held the title thereto in the name of the said Richard Durrett, who executed the title bond to said McAlexander, and who assigned the same to the said complainant, as above in said bill stated; that the same was so held to deceive and defraud the said Benjamin L. Durrett's creditors; that the said Benjamin was largely indebted and owed said Elijah and William Hook two notes which are made exhibits to this bill, the one dated November 29, 1833, for \$325, due at three months after date; the second due at nine months after date, given the same day for \$675; that, at the time of the purchase, the said McAlexander executed his two notes to Richard Durrett for two hundred and ten dollars, with William Hook security, due at the same time said Richard's notes to said Clark were due, and said McAlexander promised to pay said Benjamin the residue, being two hundred and ninety dollars, in a few days, and that the said McAlexander, at the time specified, offered the said Benjamin payment in the above-mentioned notes of Benjamin L. Durrett, due to Elijah and William Hook, the same being placed in his hands, with authority by Elijah and William Hook to make the first payment for the land, and said Benjamin, admitting said notes to be due, refused to receive a credit on them in payment for the land; that, after the title bond of the defendant, Richard, was assigned to him by McAlexander, as in the original bill stated, when one hundred dollars, the first note of McAlexander, became due, for the last payment he offered to pay the same to the said Richard in money, and that he refused to receive it, and declared that he would neither receive pay for that note, nor for the other given for \$110; that he repeatedly offered to said Benjamin and Richard to allow the whole payments for the said land out of the aforesaid notes which the said McAlexander re-assigned to him when he assigned to him the title bond aforesaid. This amended bill prays, that both defendants may answer, and prays a specific performance, &c.

Richard Durrett answers this amended bill; denies that the land held, as stated in his last amended bill, was held to deceive and defraud the said Benjamin's creditors; and also denies, that either said McAlexander or the complainant ever offered to pay to him the sum of one hundred dollars, as in his bill is stated, or

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that he himself ever refused to receive of him the said sum of one hundred dollars, or the said sum of one hundred and ten dollars, as in his bill is stated.

Benjamin L. Durrett came in and answered, stating the purchase of the land from Clark by himself, and the sale to McAlexander, and every thing relative to the purchase from Clark and the sale to McAlexander, as is stated in the answer of the said Richard. The answer of Benjamin L. Durrett re-asserts all the facts set up by that of Richard Durrett relative to the sale of the land to McAlexander, and his offer to pay in the notes made by the respondent, Benjamin, to E. and W. Hook. He also relies on the statute of frauds.

The bill of exceptions sets out the title bond made by Richard Durrett to McAlexander, and its assignment, as stated in the bill, to Hook, complainant.

McAlexander having been released by Hook, was introduced as a witness. This witness states the agreement of himself and Benjamin L. Durrett, for the sale and purchase of the land, the making of the title bond in the same manner as the same is stated in the bill and answer above: but he states that the title bond was delivered to him by Richard Durrett; that, a day or two afterwards, the witness called on the said Benjamin, and tendered to him payment of the said balance of said purchase money, the said notes executed by the said Benjamin to said William and Elijah Hook, and by the said William, surviving partner of said Elijah, assigned to witness; that said Benjamin then refused to receive said notes in payment of said balance, and that said witness refused to pay said balance in any other manner than by said notes; that said witness then assigned said title bond to the complainant.

This witness, on cross examination, stated, that before he had made any agreement with the said Benjamin for the purchase of said land, he and the complainant had some conversation about said purchase, which conversation was held at the instance of the said witness, and the complainant then told the witness, that if he could purchase said land of said Benjamin, he, the complainant, would sell to the witness the said notes of the said Benjamin at a large discount, and would give witness time on the balance of said notes; that the complainant offered to deduct about ninety dollars from said notes; that the witness agreed to buy the notes on such terms; that, at the time he purchased the land, he said nothing about paying the balance of said purchase-money in said notes; that he purposely avoided saying any thing to said Benjamin at the time of the purchase, about the manner of making the payment of the balance of the purchase-money, and he believes he left the impression on the mind of the said Benjamin at the time of the purchase, that he would receive from the witness the remaining part of the price of the land, in money, and that he did not believe that said Benjamin would have sold the land, unless he had expected to receive the remaining part in money; that, some time afterwards, he assigned the said bond for a conveyance of the land, to the complainant; and that he also re-assigned to the complainant said notes of said Benjamin, made to said William and Elijah Hook.

The complainant proved, by another witness, a demand of a deed from Richard Durrett, and that Richard Durrett admitted, at the same time, that the money was tendered to him by Hook some three or four months after it was due.

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One Garrett, produced as a witness by defendant, stated, that he was at the house of Richard Durrett in the year 1834, and that said McAlexander asked him to witness a title bond, and that he did so, and that said McAlexander took it up off the table which was sitting at the end of the house, and (says the witness) we all walked towards the fire-place. McAlexander appeared to be in a hurry, and observed, that he would pay over to Benjamin Durrett, in a day or two, witness thought it was \$200, or more, and McAlexander left without sitting down, and that Mrs. Durrett asked Richard Durrett if McAlexander ought to have had that paper, and that Durrett answered, he reckoned McAlexander would do what was right.

The defendant in error contends, that as Benjamin L. Durrett, if he had brought an action against the complainant, Hook, or against McAlexander, on the agreement to pay \$280 in time specified, *i. e.*, two or three days, would, under the statute of set-off, be compelled to receive the notes by him made to Hook in pay, therefore, when Hook, by his bill in chancery, prays a specific performance of the contract to convey land, Durrett shall be compelled to take the consideration to be paid for the land in his own notes. I cannot perceive that the one is a consequence of the other. If Durrett had sought to compel Hook or McAlexander to pay this sum of \$280, the law, which he calls to his aid, says that he shall receive in pay his own paper, which the defendant in the action at law holds. But here it is Hook, assignee of McAlexander, that sues Durrett, and wants Durrett to receive his own paper. This cannot prevail. If Durrett be insolvent, as it is said, he ought to be secured in his right to pay all his funds either equally to all his creditors, or to any one whom he may prefer. But it is contended, that there is no pretence set up in the answer or evidence introduced to show that Durrett wished to do the one or the other of these things, and therefore Hook supposes he has the right to appropriate all of Durrett's substance to his own use.

There cannot certainly be any necessity for him either to state in his answer, or to prove, that he did intend to do any such thing. It is true that the complainant has alleged in his bill, that this land was conveyed to Richard Durrett by Clark, to deceive and defraud the creditors of Benjamin L. Durrett, and B. L. Durrett has unnecessarily denied it in his answer. It may possibly be true that Durrett did intend to deceive and defraud his creditor, but that cannot possibly give Hook any right to call on a court of equity to apply the property of Durrett to pay what he owes to Hook. But if we admit, for the present, that a court of equity could correctly compel a defendant, who had promised to convey for a consideration in money, to receive his own notes in payment for the land, yet the court will always see that the person who prays its aid comes in with clean hands. In this case, Hook first introduces his complaint with the most impertinent and irrelevant charge that the title to this land was held by Richard Durrett to deceive and defraud the creditors of Benjamin L. Durrett; that he, B. L. Durrett, was largely indebted, and owed Hook a large sum of money. He next introduces this said McAlexander, whom he had released in order to render him competent, to prove his own unworthiness. McAlexander, as above stated, declares that in the treaty for this land he had cautiously concealed from B. L. Durrett that the first payment (\$280)

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was to be made in his own (Durrett's) notes, and that he did not believe that Durrett would have agreed to sell him the land if he had not expected to receive the first payment in cash, and the statement of this witness is sufficient to induce any one to believe that it was intended by Durrett that the delivery of the deed and the payment of the sum of \$280 should be simultaneous acts. But as it seems, he takes up the deed and goes off hastily, observing, that in two or three days he would pay the money to B. L. Durrett. He gave no written promise to pay the money. No man of business habits would have suffered the bond to be carried away under such circumstances, nor would any honest candid man have attempted such an act. Mr. Hook not only receives this obligation by assignment stained with the grossly improper conduct of his assignor; but his own witness, this said McAlexander, proves that he prompted the witness to the act. If the conduct of McAlexander had been otherwise honest, a delivery of the bond by Durrett would be presumed, but as the case now is in evidence, a jury would be very easy indeed to find a delivery of the bond.

The witness, Garrett, says, that the table on which the bond lay, when he witnessed it, was at the far-end of the house, and we all walked to the fire; that McAlexander appeared to be in a hurry, and went away, making the promise to pay B. L. Durrett in two or three days.

A specific performance of a contract is not a matter of course, but rests entirely in the discretion of the court, upon a view of all the circumstances of the case.—6 Johns. Chan. Rep., 222, *Seymour vs. Delancy*.

In this case the Circuit Court decreed a specific performance by Durrett, and that Hook should credit the notes of B. L. Durrett above-mentioned, with the first payment, viz., \$280, and pay to Richard Durrett the sum of \$210, with interest.

This decree of the Circuit Court must be reversed, and the bill dismissed at the costs of the complainant.

Note.—NATTON, Judge, did not sit in this case, having been of counsel in the court below.

ST. JOHN vs. HOMANS.

1. On the 16th of February, 1842, St. John drew his check on the Bank of Missouri for \$1,000. On the 24th of same month the check was presented to the Bank for payment, which was refused, except in the bills of the State Bank of Illinois. At the time the check was drawn St. John had on deposit in the Bank of Missouri, \$1702 69, in bills of the State Bank of Illinois, and the Bank of Illinois. On the 27th of the same month he withdrew his effects from the Bank, they having depreciated in value between the delivery of the check and its presentment for payment. All the parties to the check resided in the city of St. Louis. *Held:* that the holder of the check could not, under these circumstances, recover the amount of the check from the drawer.
2. The holder of a check should use due diligence in presenting the same for payment, and if the drawer sustains any loss or injury from the want of such presentment, he will be discharged.

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3. It is not necessary, in order to discharge the drawer of a check for want of due presentment, that he should have *money* in the hands of the drawee at the time of drawing the check. It is sufficient that he had *property* in the hands of the drawee.
4. The drawing of a check is not a transfer or assignment of the amount for which it was drawn to the holder.

ERROR to St. Louis Court of Common Pleas.

TODD and KRUM, for Plaintiff.

1. The evidence proves that St. John was discharged from all liability on the check, because of the delay in presenting it for payment.—Byles on Bills, 123, 124; Bailey's Bills, 229, 2d Amer. ed., 1836; Chitty on Bills, 384, 419, 465, 545, 9th Amer. ed.; 4 Starkie's Ev., part 4, p. 225; 21 Wendell's Rep., 372.

These authorities show that the rights, duties and liabilities of parties to checks and inland bills of exchange are one and the same, and that the drawer of a check is discharged from liability thereon (the drawer, drawee and holder living in the same town, as in this case,) unless the check be presented for payment on the day next after its drawing and delivery, and if not then paid, due notice thereof given to the drawer.

2. The evidence does not excuse the delay in the presentment of this check for payment.—4 Cranch Rep., 141; 10 Peters' Rep., 572; Chitty on Bills, 9th Amer. ed., 389, 477; Byles on Bills, 167, 168; Story on Bills, sec. 367, 370.

These authorities show that due presentment and notice of non-payment are indispensable to fix the liability of a drawer, if he have *any effects* in the hands of his drawee—or there is a fluctuating balance between them—or if the drawer has reason to expect his check will be paid or can be exposed to any loss by the omission to duly present and give notice in case of non-payment.

There must be fraud in the drawing, and no exposure to injury for want of due presentment and notice to excuse the same.

3. The withdrawal by St. John, of his funds, from the Bank, after the protest of the check, was rightful, and gave no right of action to the holder of the check.—Chitty on Bills, 384, 465, 466; 6 Wend. Rep., 658; 1 Term Rep., 408.

These authorities show that the holder of a bill of exchange makes it his own, and can neither sue the drawer on the bill or on the original consideration, or otherwise, if he omit due presentment and notice of dishonor, in case of dishonor, to the drawer, when entitled to it—as, against the drawer, the holder suffers a total loss.

BOGGS, for Defendant.

The defendant insists that the judgment ought to be affirmed.

1. Because the check was payable in legal currency, and nothing else, and the drawer had no funds to meet it in bank, and was consequently not injured by the omission of the holder to present it immediately.

2. The drawing of the check operated as a transfer to the holder of one thou-

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sand dollars on deposit in bank, and he is liable to the holder for the value of the funds so withdrawn by him.

3. If a check is not presented in due time, and the drawee should fail before it is presented for payment, the drawer is discharged; but if the drawer is not injured by the delay, the rule is different.—Chitty on Bills, 421; 3 Kent's Com., 88, 89; Barn. & Cress., 388, or 17 Com. Law Rep.

4. Checks are transferable, and are, strictly speaking, not due before payment is demanded, in which particular they differ from bills of exchange or promissory notes payable on a particular day.—Chitty on Bills, 546.

5. The judgment below was for the value of the currency at the time of presentation, and as the drawer was not in the least injured by the delay in the presentation of the check, the judgment should not be disturbed.

SCOTT, J., *delivered the opinion of the Court.*

This was an action of assumpsit brought by the defendant in error against the plaintiff in error, on a check drawn by the latter on the Bank of the State of Missouri, for one thousand dollars. The check was delivered to Carter & Smith on the day it was drawn, and by them was transferred on the same day to the defendant in error, as cashier of the Perpetual Insurance Company. The check was drawn on the 16th February, 1842, and was presented for payment on the 24th of the same month; and payment by the bank was refused except in the bills of the State Bank of Illinois. On the same day it was presented to the drawer, who refused to pay it, and it was protested for non-payment, and notice thereof given. It appears that the drawer had on deposit in the Bank of Missouri at the date of the check \$1702 69, in bills of the State Bank of Illinois, and Bank of Illinois. The said sum remained with said Bank for more than ten days after the date of the check, to be paid out to the defendant's order, in bills of like kind and not in gold or silver. On the day the check bears date, the drawer placed in the bank \$1000 in bills of the State Bank of Illinois, with which he was credited as a special deposit. At the time the check was drawn, the St. Louis Perpetual Insurance Company received on general deposit as currency, the bills of the State Bank of Illinois, and Bank of Illinois, and continued to do so up to the 24th day of February, and that said company paid out said bills as currency, at their nominal value in ordinary business transactions, or checks drawn on said company. On or about the 24th February, 1842, the said Perpetual Insurance Company gave notice that the bills of the State Bank of Illinois would not be received except on special deposit. That said company continued to receive the bills of the Bank of Illinois on general deposit, and to pay the same out as currency at the nominal value of said bills until after the bringing of this suit. That the said Insurance company, at the date of the check, and up to the time of the commencement of this action, was employed as an office of discount and deposit in the city of St. Louis, and in the daily practice of receiving on deposit, and paying out, large sums of money. The plaintiff below received the check as cashier of the Perpetual Insurance Company. The Bank of Missouri passed a resolution, that after the

16th February, 1842, the notes of suspended banks would not be received on general deposit. All the parties to the check resided in St. Louis. When the check was drawn, and for several days thereafter, the bills of the State Bank of Illinois and Bank of Illinois were twenty per cent. below par in St. Louis. On the 24th of February, the bills of said banks were thirty per cent. below par. The defendant below at the time of drawing, and at no time before said check was presented for payment, had any other funds in the bank than those above mentioned, and on the 27th February, 1842, he withdrew his deposit from the said bank.

The parties made an agreed case, and upon the foregoing state of facts, the court below gave judgment for the defendant below for \$700.

This case involves the character and qualities of a check. All the elementary writers agree in holding that a check is like a bill of exchange. But a difference of opinion is entertained in relation to the degree of diligence necessary to be employed by the holder, in order to retain his recourse against the drawer, in the event of its being dishonored. Some, impressed with the impolicy of multiplying anomalies in the law, which serve to embarrass the application of general rules, maintain that the holder of a check is bound to the same diligence as the holder of a bill, and that whatever laches will discharge the drawer of a bill, the same will in like manner discharge the drawer of a check. Others maintain, that unless the drawer is injured by the delay in presenting a check for payment, he is not discharged by the negligence of the holder. These would throw the *onus* of proving the injury caused by the neglect of the holder, on the drawer, in an action against him, contrary to the rule in actions on bills of exchange, in which parties endeavoring to obviate the effect of negligence are obliged to show that the defendant has sustained no injury in consequence of it. It must be confessed, that the inclination of the authorities tend to the support of the principle, that bills of exchange and checks are alike in all respects, and that the holder of a check is bound to the same diligence as the payee or endorsee of a bill of exchange.

Without a specific reference to the authorities maintaining the different views above set forth, it will be sufficient to refer to the case of *Harker vs. Anderson*, 21 Wendell, 372, as containing all the learning on this question. The opinion of the laborious and enlightened judge therein delivered, contains a review of all the American and English authorities, and an effort is made to show that they may be reconciled in support of the principle for which he contended, that the analogies between bills and checks were perfect and without exception.

In the case under consideration the parties to the check resided in the city of St. Louis; had it been a bill of exchange, it would have been the duty of the payee to have presented it for payment the day after it was received. It was not, however, presented until eight days after it was delivered; and subsequently the drawer withdrew his effects from the bank, they having depreciated in value between the delivery of the check and its presentment for payment.

It is urged by the defendant in error, that the notes on deposit were not money, and the plaintiff in error, consequently, could sustain no injury in consequence of the laches of the holder of the check. It cannot be maintained that the drawer of

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a bill or check should have in the hands of him on whom he draws, money or cash, in order to exact due diligence from the holder of the bill or check. In the absence of all authority on this subject, reason would dictate, that the drawer is as much exposed to loss from the want of diligence in the holder when he has property or effects in the hands of the person on whom he draws, as when he has money. But there is no foundation for this position in authority: the contrary is maintained. (*Chitty on Bills*, 469.) Nor can it be maintained, as was contended, that the mere act of drawing the check was an assignment of the amount for which it was drawn to the bearer.—*Mandeville vs. Welch*, 5 Wheaton, 286.

Here, then, is a case, in which it is admitted that the drawer has sustained a loss. Had the check been presented for payment the day after it was delivered, that loss might have been avoided. It was not done. Then, whether a check is to be regarded in all respects as a bill of exchange or not, the defendant in error has not shown a right to recover.

Judgment reversed.

FISHER vs. GORDON.

1. In a proceeding before a sheriff or constable, to try the right of property between the defendant in the execution and the claimant, the verdict of the jury is a full protection to the officer, as well against the plaintiff in the execution as the claimant. The plaintiff cannot compel the officer to sell the property levied upon by tendering a sufficient bond of indemnity.—See Rev. Stat., 1835, title, "Executions," sec. 24, p. 257; also, "Justice's Courts," art. 7, sec. 14, 15, 16, p. 367.
2. An officer is bound to use reasonable diligence in searching for property of the defendant in the execution, but the mere fact that the defendant had property will not render the officer liable, if he used reasonable diligence to discover property, and could find none.

ERROR to St. Louis Circuit Court.

Todd and Krum, for Plaintiff.

1. The court erred in refusing to permit the plaintiff to prove that, upon the decision of the constable's jury in favor of Kennerly's claim, he directed the defendant to sell the property, offering at the same time good and sufficient indemnity to defendant therefor, which the defendant refused to do.—*Watson on the office and duty of sheriff*, 195; 8 Johns. Rep., 185; 10 *Ibid.*, 98; 15 *Ibid.*, 147; 8 Cowen's Rep., 65; 5 Wendell's Rep., 309; 1 Hall's Rep., 596; 6 Mo. Rep., 166.

These references directly show, that if a third person claim the property levied upon under an execution, the officer may, for *his protection*, call a jury to try the validity of the claim. If they decide for the claim, the officer may abandon the levy, unless the plaintiff shall direct him to sell, offering at the same time a suffi-

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cient indemnity, in which case the officer is bound to sell or take the hazard of a suit for a false return, without any aid in such suit from such decision, except as evidence to protect him from vindictive damages. The reasons are, that thereby the officer has full protection for his acts, which is all he has any right to or interest in; and also, the plaintiff's right to a satisfaction of his debt out of the property of his judgment debtor is thereby saved from the jeopardy of a trial, the most inadequate imaginable for a correct determination of conflicting rights. But it will be observed that the law, without any statutory provision, did not at all protect the officer for selling, in case the verdict were against the claimant. The claimant had still his action to recover of the officer the worth of the goods sold. There was, perhaps, fair and just occasion for legislation, and accordingly, by the enactment of section sixteen of Revised Statutes of Missouri, p. 367, it was provided, that "if the jury find the goods and chattels to be the property of the defendant in the execution, the verdict shall, as against the claimant, justify the officer in selling such goods and chattels." If the verdict be for the claimant, the officer is subject to the same law, and the plaintiff has the same rights existing before this enactment, and so considered in the case of *Little vs. Seymour et al.*, 6 Mo. Rep., 166.

2. The court erred in refusing to give the instruction asked for by the plaintiff.

The plaintiff proved, without objection, that Greene, at the time of the levy in her boarding-house, had other property in her boarding-house, and no excuse was attempted for omitting to levy upon that. An officer is bound to use active and thorough diligence for finding property to satisfy an execution out of.

3. The verdict was against law and evidence, because the plaintiff's evidence proves that there was enough other property of Greene's besides that levied upon, within the reach of active diligence, and the defendant's proof of the verdict of the jury upon Kennerly's claim was no evidence at all on this trial, to show that the property levied upon was not Greene's, but was evidence only to show that the defendant did not act fraudulently, and to save him from vindictive damages.—Same authorities as under first point.

The defendant on this trial was bound to prove the property levied upon out of Greene as fully as if said verdict had not been had.—5 Wendell's Rep., 309; 2 H. Black., 437; 3 Maule and Selwyn, 175; Starkie and Phillips on Evidence, under the head of "Inquisition."

NAPTON, J., delivered the opinion of the Court.

This was an action against defendant for a false return as constable of St. Louis township. The declaration contained but one count, and in substance averred, that the plaintiff recovered before a justice of the peace in St. Louis township a judgment against one H. L. Greene for seventy-eight dollars and eighty cents, with damages and costs; that on this judgment an execution issued, directed to defendant; that under said execution defendant levied on sufficient goods and chattels of said Greene to satisfy said judgment, but notwithstanding such levy, defendant falsely and fraudulently returned that said Greene had not any goods or chattels in his township whereof he could cause to be levied the debt and damages aforesaid.

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Upon the trial, the plaintiff proved the judgment before the justice, the issuing of the execution, and the return upon the same, which was in the following words: "In this case property was levied upon as the property of defendant, and advertised, according to law, for sale. Augustin Kennerly came in by his attorney, and claimed said property, and filed his interpleader for the same; and on the 28th day of January, 1841, a trial of the right thereof was had, but the jury disagreeing, was discharged, and by agreement of parties, the 29th day of said month was set for a re-hearing: whereupon a jury was summoned, and sworn on the day last aforesaid, who, after hearing the evidence and arguments of counsel, decided that the property belonged to A. Kennerly, the claimant; whereupon said property was released. No other property of defendant found in St. Louis township whereon to levy and make the debt and costs in said case, or any part thereof.—J. Gordon, constable." It was admitted, that the property levied on by the sheriff, and found by the jury to belong to Kennerly, was sufficient to have satisfied the execution. It was also admitted, that the verdict of the jury, on the trial of the right of property, was as stated in the sheriff's return.

The plaintiff then offered to prove, that immediately upon the rendition of said verdict, he directed said defendant to proceed and sell so much of said property levied on, as aforesaid, as would satisfy his said judgment against Greene, notwithstanding said verdict, and that he at the same time offered a good and sufficient indemnity to said constable for so doing, to the admission of which evidence objection was made by defendant, and sustained by the court. The plaintiff then offered to prove that said verdict was wrong, which the court also, on objections being made, refused to admit. To the several objections of the court on this subject, exceptions were duly taken and saved by bill of exceptions.

The plaintiff then introduced evidence to show that there was property in the house of said Greene, at the time of the levy, other than that which had been levied on, to the amount of forty dollars, or thereabouts. The plaintiff also asked the court to instruct the jury, "that if they believed, from the evidence, that there was property belonging to and in the possession of H. L. Greene, (other than the property levied on by defendants,) and which the defendant might have levied on under the plaintiff's execution, they must find for plaintiff." The court refused this instruction. The verdict was for the defendant. A motion for a new trial was made and overruled, and exceptions duly taken and saved to the action of the court on this subject.

How far the inquisitions taken in pursuance of our statutes, to ascertain the right of property which has been levied on under execution, will protect the officers who act in accordance with such verdicts, is a question which has never been directly passed upon by this Court. It is a very important question in the practical administration of justice.

By the common law, the sheriff might summon a jury to satisfy himself of the right of property, and that inquisition, whilst it did not bind the right of property between the litigating parties, justified the sheriff in an action by the plaintiff for a false return. (*Farr vs. Newman*, 4 Term Rep., 633, 648.) But it formed no justification for seizing goods not belonging to the defendant in the execution, in

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an action of trespass by the claimant. (Townsend vs. Phillips, 10 J. R., 98.) Nor was it any justification, in an action for a false return, if the plaintiff tendered sufficient indemnity.—Van Cleef vs. Fleet, 15 Johns. Rep., 148; Hart vs. Dermer, 6 Wend., 497; Curtis vs. Patterson, 8 Cowen's Rep., 65.

It is said by Judge Ousley, in the case of Lampton vs. Taylor, (Littell's Select Cases, p. 274,) that although, at common law, it is a general rule, that wherever the consideration which is the ground of the promise, or the promise which is the consequence or effect of the consideration, is unlawful, the whole contract is void; yet the case of a promise to a sheriff to indemnify him for taking property under a *fieri facias* which is not subject to the writ, is said to form an exception, and such a promise has been held valid. For this, Cro. Jac., 652, is cited as authority. In the same case the court held, that after a jury had found the property levied on not subject to the execution, the plaintiff could compel the sheriff to sell, by giving the bond with security required by the act of assembly of that state. It appears that in Kentucky there is a statute authorizing such bonds, and in New York, where there is no statute on the subject, it has been held that they are legal, and when tendered to the sheriff will oblige him to sell, notwithstanding the inquisition found.

Our statutes are entirely silent in relation to bonds given to sheriffs to indemnify them for selling property not liable to the writ. Such bonds are not illegal, and the sheriff might protect himself in this way, if he thought proper; but it is clear, under our statute, that he is not bound to sell when such a bond is tendered. The act which provides for inquisitions by sheriffs to ascertain the right of property levied on under execution, makes the verdict of the jury, whichever way it goes, a complete indemnity to the sheriff, provided he acts in conformity with such finding. It authorizes a sheriff to summon a jury to try the right of property, whenever he is notified of a claim; empowers him to summon witnesses, compel their attendance and administer oaths to the jurors and witnesses, and declares that "the verdict of such jury, being rendered in writing, and signed by the foreman, shall be a full indemnity to such officer proceeding thereon."—Rev. Code, 1835, title, "Executions," p. 257.

The law, however, in relation to executions issuing from justices' courts, is couched in different language. That act provides, that the constable, upon a claim of property, may summon a jury, to try the right of property, and may administer the oaths to the jurors and witnesses, as in case of the sheriff, and that such jury shall be judges of the law and the fact; but it declares such finding to be an indemnity to the constable, only as *against the claimant*, when the property is found to be liable to the execution. (Rev. Code, 1835, title, "Justices' Courts," p. 367.) When the verdict is for the claimant, the law is silent as to its effects, except that it provides in such case that the plaintiff in the execution shall pay the costs.

Did the legislature mean to place the powers and privileges of sheriffs and constables on a different footing, in respect to their inquisitions? It must be acknowledged, that it is not easy to discover any reason why the constable and the sheriff should not be entitled to the same protection in the discharge of the same

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duties; and as the constable acts in a more limited sphere, both as it regards extent of territory and the value of property subject to his acts, this summary and *ex-parte* proceeding, in which the law and the fact are left to a jury without control and beyond revision, would seem to be less liable to abuse when conducted by the constable, than in the case of sheriffs, where more important interests are involved. It cannot be that an indemnifying bond was contemplated in the one case and excluded in the other, for, as we have seen, such bonds are not mentioned in the statute book, nor their validity at any place recognized, but the inquisitions which these subordinate ministerial officers are authorized to take seem designed to relieve them from all responsibility, and place their acts, so long as they are based upon such verdicts, beyond the reach of attack, either from the plaintiff or claimant. This is the spirit of the act concerning executions from justices' courts, if the general act concerning executions were erased from the statute book. No other construction can be placed upon it which will give its provisions any sensible operation. If the inquisition by the constable was held not to protect him from an action by the plaintiff, the constable would still be obliged to sell at his own risk, and there would be no inducement for the claimant to give notice of his claim, when he must know that whatever might be the issue, the constable would sell.

It may be well thought, that a court would not lean in favor of these inquisitions if any reasonable doubt could be entertained of the intentions of the law-making power. It was observed, by an eminent judge, in the case of *Van Cleef vs. Fleet*, that "it would be intolerable to consider these inquisitions as decisive of the right of property, considering the manner in which they are taken, and the great abuse to which such a proceeding is liable." Yet the inquisition is declared to be conclusive, by our statute, when taken by the sheriff; it is also declared to be conclusive when taken by the constable, as against the claimant. If it be conclusive when found in favor of the plaintiff, why should it be otherwise when found against him? There is no reciprocity or consistency in making it a bar in one case and not in the other.

For these reasons, we are of opinion that the Circuit Court of St. Louis county committed no error in refusing to permit the plaintiff to go behind the constable's return, with a view to set aside the inquisition of the jury. That finding was a protection to the officer, as well against the plaintiff as the claimant, and authorized him to return *nulla bona*.

In relation to the instruction which was refused by the court, it will be observed, that it was entirely too broad and comprehensive in its terms, and exacted a degree of diligence on the part of the officer which the law does not impose on him. The officer is bound to use reasonable diligence in searching for property. It is usual for the plaintiff to point out property where it is not known to the officer, but if it were pointed out by another, or if the officer had knowledge of such property, no matter how obtained, it would be sufficient to establish his liability.—*Bell vs. The Commonwealth*, 1 J. J. Marsh, 551.

But the instruction demanded by the plaintiff assumes that the officer is liable,

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if there was property in possession of defendant not levied on, whether known to the officer or not; whether pointed out to him by the plaintiff or not; and whether it was in a situation where, by reasonable diligence, it could have been discovered or not.

Judgment affirmed.

SCOTT, J.—The impropriety of adopting the common law in relation to the inquisitions of sheriffs and constables to try the right of property between a claimant and the defendant in the execution, results from the existence of the statute making the verdict of a jury an indemnity to the officer against any action of the claimant. If an officer could be compelled by the plaintiff to sell, notwithstanding the verdict in favor of the claimant, then no person would interpose a claim at the risk of the payment of costs, when a verdict for him could be rendered ineffectual by compelling the officer to accept a bond of indemnity. The consequence of such a course would be, to render the statute nugatory, and thereby strip the officer of that protection which the law intended to give. The sheriff may, if he will, accept the bond of indemnity, and sell, and such a bond, whatever doubts may have been entertained to the contrary, would be held valid. If he should refuse, the plaintiff in the execution would not be without redress, as a court of equity would be open to his assistance.

The judgment must be affirmed.

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It is a well-established principle, that when a contract is reduced to writing, all anterior and contemporaneous stipulations and representations are merged in the written instrument. This rule, however, does not exclude fraudulent misrepresentations made for the purpose of inducing a party to enter into contract sought to be enforced.

APPEAL from Cooper Circuit Court.

TODD and MILLER, for Appellant.

1. The clause in Conner's deed to Gooch, saving the rights of Conner as to his mill and works, is not a covenant or agreement upon which suit will lie; or by which Gooch is estopped from alleging the fraud, misrepresentation, or mistake of the grantor, in procuring such reservation.—4 Cruise's Digest, p. 11, 15, 213, sec. 56; 15 Mass. Rep., 183; 1 Starkie, 262; 2 *Ibid.*, 557; Greenleaf's Ev., 30.

2. If the clause in the deed operates for the grantor as an agreement, it is no

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more than the law imposed upon Gooch upon the erection of a dam and works upon the stream below Conner's mill.—3 Kent., 439.

3. The action being in case, gave the defendant liberty under the issue to prove these circumstances in justification, or excuse for the injury complained of.—1 Chitty, 527.

4. The circumstances offered in proof are directly calculated to show fraud, misrepresentation, or mistake in the plaintiff, by which the defendant gave his consent to the reservation.

5. The plaintiff, by parol license, authorized the defendant to erect his dam as he did, which is a justification, and the proof offered was legal to show such license.—4 Dana, 338; 7 N. H. Rep., 237; 7 Bingham, (Com. Law,) top-paging, 287; 7 Taunton, 145, top-paging; 1 Chitty, 528.

LEONARD and HAYDEN, for Appellee.

1. The plaintiff had a right to the use of the stream as it flows through his land, without any interruption from the proprietors above or below, and is therefore entitled to recover for any injury to his machinery occasioned by the erection of the defendant's dam.—*Menzies vs. Breadelbone*, 3 Bligh, N. S., 418; *Wright vs. Howard*, 1 Sim. and Ster. 203, reported in 1 Eng. Chancery Reports, cond., 95; *Mason vs. Hill and Others*, 3 Barn. and Adolph., 304, reported in 23 Eng. Common Law Rep., cond.; *Cross vs. Lewis*, 2 Barn. and Cress. 686, 690, reported in 9 Eng. Com. Law Rep. cond., 221; *Tyler vs. Wilkinson*, 4 Mason's Rep., 500; *Gilman vs. Tilton*, 5 N. H. Rep., 231; *King vs. Tiffany*, 9 Conn. Rep., 152; *Crooker vs. Bragg*, 10 Wendell Rep., 260; 2 Phillips' Ev. (Cowen and Hill's edition) part 1, pp. 375, 384.

2. The plaintiff's declarations to Woodward, made several years before the sale, and to Chandler a short time previous to the sale, was properly excluded.—3 Kent's Com., 4th edition, 451, 453; *Munford vs. Whitney*, 15 Wend. Rep. 381; *Greenleaf's Evidence*, 315, 316; 3 Phillips' Evidence, Cowen & Hill's ed., part 2, p. 1466–1476, and cases there cited; 1 *Greenleaf's Ev.*, 30; *Sherwood vs. Salmon*, 2 Day's Cases in Error; *Chapman vs. March*, 19 Johns. Rep., 289; 4 Cow. Rep., 442; *Story's Equity*, 207, 8, 9, 10.

3. The omission of the plaintiff to object to the erection of the defendant's dam to the height to which it was erected, was no evidence of a parol license to make such an erection as would back the water upon the plaintiff's machinery.—1 *Greenleaf's Ev.*, 229, 230.

NAPTON, J., delivered the opinion of the Court.

This was an action of trespass on the case brought by Conner against Gooch, to recover damages occasioned by the back-water from Gooch's mill-dam flooding the machinery of the plaintiff's mill. A verdict was found for the plaintiff for \$970 89, upon which judgment was entered, and from this judgment defendant appealed.

Upon the trial it appeared that the plaintiff was the owner of a mill site, mills and machinery connected therewith for grinding, sawing, &c., situated on the same stream with defendant's mill site, and about four or five miles above it; that plaintiff's mills had been erected, the steps required by our statute having been taken, some fifteen or eighteen years; that the site occupied by defendant originally belonged to plaintiff, and had been, at his (the plaintiff's) instance, condemned for a dam ten feet high, and subsequently to such inquisition was sold by plaintiff to defendant, who erected a dam thereon about seven feet and a half high, the backwater from which overflowed the plaintiff's wheels.

The defendant offered, in his defence, to prove by a witness, that he, the defendant, came from Ohio to the house of witness, in Cooper county, in 1838; that whilst there plaintiff inquired of witness whether defendant had yet purchased a mill site, and being informed that he had not, requested witness to tell defendant that he, plaintiff, would sell him one at Big Lick for \$2500; that he, plaintiff, had had the site condemned for a dam ten feet high, but that he did not think he could warrant one more than eight and a half or nine feet high, from the apron; that this conversation was repeated by the witness to defendant, who thereupon, in company with witness, went to the house of plaintiff, and contracted for the purchase of said site, it being the same site upon which defendant's dam is erected. This testimony was rejected by the court.

The defendant read the deed from plaintiff to defendant, conveying the tract of land embracing the said site, which was a deed poll, and contained the following clause:—"It is, however, distinctly understood, in conveying the said land, that the said Conner conveys no right to the said Gooch by virtue of his having a mill site condemned on the premises, to erect a mill dam that will injure said Conner's mill by backing the water on him."

The defendant offered to read the petition of plaintiff to the Cooper Circuit Court, praying for a writ of *ad quod damnum*, and for leave to erect a dam ten feet high at the Big Lick, (being the site conveyed to defendant,) with the proceedings, and final order of the court thereon, but the same were excluded by the court.

The defendant also offered the deposition of Joel E. Woodward, the sheriff of Cooper county, when the writ of *ad quod damnum* was executed, to prove that plaintiff declared to witness, at that time, that he (plaintiff) had levelled the creek from Big Lick to his own dam, and that a ten-foot dam would not injure his mill, though he only desired an eight-foot dam, and that plaintiff requested witness to state this to the jury. This testimony was also rejected.

The defendant also offered to prove by witnesses, that in July, 1840, after the deed executed by plaintiff to defendant, the plaintiff stated that he had always been under the impression that a mill dam eight or eight and a half feet high could be erected upon the land he sold defendant, without obstructing the plaintiff's mill dam; but that since defendant had erected his dam, he found he was mistaken.

The defendant also offered to prove that at the time his dam was being built, the plaintiff was present and knew of defendant's intention to erect it at the height it was, before suit brought, and made no objections.

To all of which testimony plaintiff objected, and the court excluded it.

There was testimony on both sides in relation to the extent of the damages, about which there is no controversy here.

The court instructed the jury, that if the backwater from the defendant's dam injured the machinery of the plaintiff's mill, the plaintiff was entitled to damages equal to the actual loss sustained; and that the fact that plaintiff sold to defendant the site upon which defendant's dam was erected, gave the defendant no right to build his dam so high as to flow the water back upon plaintiff's mill.

The only question presented by the record is, whether the testimony offered by the defendant on the trial was properly excluded.

This was an action on the case, in which, under the instructions of the court, the plaintiff recovered damages to the amount of the injury he sustained.

As no vindictive damages were claimed or awarded, if the plaintiff was entitled to recover at all, he was entitled to such damages as were given, and evidence in mitigation of damages was inadmissible. The only ground, then, upon which the excluded testimony could be permitted, must be that it would, if credited, conduce to establish a legal defence or complete bar to the action. Does the evidence offered by defendant amount to such a defence?

The testimony rejected consists both of declarations made by the plaintiff previous to the sale and deed to defendant, and declarations and acts of defendant subsequent to the conveyance.

This deed, being executed only by the plaintiff, did not constitute what in law is termed an *estoppel*; but being accepted by the defendant, is undoubtedly the evidence and only legal evidence of the contract of sale. The general principle is well established, that where a contract is made, all anterior and contemporaneous stipulations and representations are merged in the written instrument. This rule has, however, not been understood to exclude fraudulent misrepresentations, introduced by a party desiring to avoid the contract, or seeking redress for injuries sustained in consequence of such misrepresentations; nor is there any rule of evidence which would prevent a defendant from availing himself of such fraudulent misrepresentations where the contract induced by the malpractices of the plaintiff is sought to be enforced.

It is not a question here, however, whether the defendant could maintain an action for a deceit practised in the sale of this land, or whether, in the present action, disconnected as it is with this contract, the defendant could avail himself of fraudulent misrepresentations of the plaintiff, inducing him to accept a conveyance with certain stipulations, to show that the injury sustained by the plaintiff was brought about by his own misconduct. There is no pretence of any fraud here; the defendant does not offer to prove any fraudulent misrepresentations. To what purpose, then, shall the conversations between plaintiff and defendant's agent, previous to the sale, be admitted?

They are inadmissible for the purpose of explaining, varying, or annulling the deed. If they amounted to a license, the deed was a revocation of the license.

It may be said, that the evidence offered by the defendant should have gone to

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the jury, and that it was their province to determine whether it amounted to fraud or not.

Fraud is undoubtedly a question of intent, to be determined by the jury from all the facts in evidence before them. But where testimony is inadmissible upon general principles, and that testimony is sought to be introduced for a special purpose, for which special purpose it is alone admissible, that object must be avowed. A court would not presume that fraud is attempted to be proved, where it is not charged.

If the representations made by the plaintiff in relation to the height of the dam were occasioned by an innocent mistake, in a matter about which he had no peculiar or exclusive means of judging, such representations must be considered as merged in the written contract, and were properly excluded.

In relation to the declarations and acts of the plaintiff subsequent to his deed to defendant, we are of opinion that they were properly excluded. We cannot see any legitimate purpose to which they could be applied. The fact that plaintiff stood by and made no objections, during the progress of defendant's building, could amount to nothing, it being evident that until the dam was closed, he was, or might have been, ignorant of the effect it would have upon his own works. The evidence offered could not mitigate the damages, for no vindictive damages were given or sought, and it was no bar to the action as a parol license, or tending to establish a parol license.

Judgment affirmed.

DRAFFEN ET AL. vs. CITY OF BOONVILLE.

Defendant was collector of the revenue for the city of Boonville for the year 1839 and 1840. Bonds with different sets of sureties were given for each of those years. The fiscal year commenced on the 3d of May. The register of the city kept a general account with defendant, and on the 3d of May, 1840, defendant was charged on the books of the register with a default of \$1,437, and this balance was carried over to his account in 1840. The tax-books of 1840, placed in defendant's hands and charged to him, amounted to \$2,631 84. During that year, defendant paid over and was credited with \$3,003. Nothing was ever said as to the application of the payments, to any particular items of indebtedness, but the payments were credited to his general account. At the end of the fiscal year 1840, there was a general balance struck against defendant, of \$1,070 66. The question was, whether the sureties in the bond of 1840 were liable for this balance, it not appearing from what source the moneys paid in during the fiscal year 1840 were derived.

Held: That where an officer is chargeable with the revenue of a specified year, it will be presumed, in the absence of all proof to the contrary, that payments made during that year are designed to extinguish the liabilities of such year. But in the absence of all proof of intention, payments made in the year 1840, before the collector was charged with the revenue of that year, must be imputed to extinguish the oldest item of indebtedness.

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APPEAL from Cooper Circuit Court.

ADAMS and LEONARD, for Appellants.

1. The law of this case is properly stated in the first, second, and third instructions on the part of the defendants, which were refused by the court.—8 Wend. Rep., 403, *Seymour vs. Vanslick*; *Stone vs. Seymour and Buck*, 15 Wend. Rep., 19; 3 Johns. Digest, 451, 452; 7 Cranch's Rep., 572; same case, 2 Cond., 611; 1 How. U. S. Rep., 250, *United States vs. Eckford's Executors*.

2. In cases of bonds conditioned for the faithful discharge of duties for limited periods, the liabilities of sureties in such bonds cannot be extended beyond the period mentioned, either in its commencement or duration.—See *Norris's Peak*, 414; 6 Cond. Rep., 611; 6 East., 507; 8 Mass. Rep., 276; 2 Saund. Rep., 411, 415; 2 Black. Rep., 934.

3. In this case the sureties were only liable for the collection of the revenue for the year 1840, and were in nowise bound for the defalcation of 1839, each set of sureties being entitled to the benefit of the moneys paid in during their respective suretyships.

4. The course pursued by the counsel for plaintiffs, in commenting upon and reading instructions which had been excluded from the jury, was unwarranted, and calculated to mislead the jury.

HAYDEN and RICHARDSON, for Appellees.

1. The court very properly instructed the jury as to the application of the payments made by Draffen during the fiscal year of 1842.—2 Starkie, 598, and note g.; 1 Starkie's Ev., 153; 9 Wheaton, 720; 5 Cond. Rep.; 2 Maule and Selwyn, 18; 2 Cond. Eng. Common Law Rep., 335; 5 Taunt., 596; 6 Taunt., 597; 6 Cranch, 320; 15 Wend., *Stone vs. Seymour*, 39-44; 11 Cond. Eng. Com. Law Rep., 35; 1 Pick., 336; 2 N. H. Rep., 196.

2. There is no error in that the demurrer to the defendant's plea of set-off was not disposed of before the trial, because there being no judgment on the demurrer, and issue being joined to the said plea, this court will presume that the demurrer was withdrawn.—*Sweeney vs. Willing*, 6 Mo. Reports, 174; *Patrick vs. Conral*, Lit. Sel. cases.

3. The Circuit Court very properly refused to arrest the judgment.—2 Mo. Rep., 137.

NAPTON, J., delivered the opinion of the Court.

This was an action of debt upon the official bond of Draffen, as collector of the revenue of the city of Boonville for the fiscal year 1840.

The bill of exceptions taken on the trial preserves the testimony and instructions of the court—upon which alone any question is presented.

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The plaintiffs, it seems, were a corporation chartered by act of the legislature, with authority to levy and collect taxes for the support of the city, appoint collectors, and take bonds. The defendant, Draffen, was appointed collector for the fiscal year 1840, which fiscal year commenced on the 3d of May, 1840, and terminated on the 3d May, 1841, and the bond sued on was executed by him, with Porter and Kukelham as securities. The condition of this bond was, the said Draffen, as collector of the city revenue for 1840, should well and truly discharge his duties. It also appeared, that said Draffen had been collector for the previous year, commencing on the 3d May, 1839, and ending on the 3d May, 1840, and had given bond and security for the discharge of his duties during that year.

It also appeared that the register, who kept the accounts of the city, kept a general account with Draffen, commencing with the year 1839, and that, at the close of that year, to wit, on the 3d of May, 1840, he was charged on the books of the register with a default of \$1437; that this balance against him, at the close of the fiscal year 1839, was carried over to his account in 1840; that, in 1840, the tax books of the general revenue were placed in his hands, and charged to him on general account, amounting to \$2631 84; that, during said year, Draffen paid over, and was credited with the sum of \$3003; that nothing was said as to the application of said payments to any particular items of indebtedness, but the same was credited to him in general account, without any specific application by either party; that, in like manner, the special taxes for grading and paving Fifth-street of said city, were placed in his hands, amounting to \$4888, and debited in the said general account, on which he paid \$4848 during the said year 1840, which was credited to said general account; that Draffen was entitled to 2 per cent. for collecting the special tax aforesaid, which left a balance in his favor on said special tax of about \$50. It also appeared, that after allowing said credit of fifty dollars, and all others credited in the fiscal year 1840, a general balance was struck against him for the sum of \$1070 66.

It was also proved, that Draffen was unacquainted with the mode in which the register kept these accounts; that he made no objections, but admitted the books to be correct, and was willing to settle by them. It appeared also that the register did not know from what source the moneys paid in during the fiscal year 1840 were derived.

On this evidence the court directed the jury—

1. If they believed that the register of the city kept a running account against said Draffen, extending through the fiscal years 1839 and 1840, embracing the general and special taxes, and that, at the end of the year 1839, there remained due the city a balance, which was carried into the account current for the succeeding year; that Draffen was aware of this mode of keeping the accounts, and made no objections, and gave no directions as to any specific applications of the moneys he from time to time paid in, and that the register applied the payments to the general account, then the defendants are responsible for the default appearing at the commencement of this suit.

2. That the default of the fiscal year 1839 ought not to be charged against the defendants.

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3. That although the register may have transferred the default of the officer, Draffen, for the fiscal year 1839, to the general account for 1840, yet these defendants are not accountable for that default.

4. That if Draffen made payments in 1840, and intended those payments to extinguish his liabilities for that year, then such payments must be so applied, and the intended application may be inferred from circumstances.

Under these instructions, the plaintiff had a verdict for \$1003, with interest. A motion for a new trial was made and overruled, and judgment was rendered on the verdict.

The law in relation to the imputation or application of payments, in running accounts between individuals, is well settled. The debtor has a right to direct to which account the payment shall be applied, and, if he is silent, the creditor may make the application; and in the absence of any indication of the intention of the parties, the law will make the appropriation, by applying the payment to the extinguishment of the oldest item of indebtedness. A difference of opinion has, however, prevailed, in the application of this rule to cases where the rights of securities are involved. In the *United States vs. Kirkpatrick*, (9 Wheaton, 737,) the rule was maintained, without any reference to a change of official responsibility, though the effect of the judgment in that case was to relieve the securities, and fix the default at a period when the government was without security. In the case of the *Postmaster-General vs. Farbee*, (4 Mason's Reports, 335,) it was held by Judge Story, that in the absence of any distinct appropriation the rule was the same, whether the debt or a part of it was secured or not, upon the ground, that whatever would extinguish the indebtedness of the principal in the order of time, would extinguish the indebtedness of the sureties in the same order. And this view of the law is adhered to by Judge Story in the last edition of his *Treatise on Equity*; (1 Story's Equity, 459, g.;) and the cases of the *United States vs. Kirkpatrick*, *Postmaster-General vs. Farbee*, and *United States vs. Wardwell*, (5 Mason,) are cited in support of the position. But the applicability of this rule to cases where different sets of securities were concerned, was expressly denied in the case of *United States vs. January and Patterson*, (7 Cranch, 572,) and since the late case of *United States vs. Eckford's Executors*, (1 Howard, 263,) the question may be regarded as settled in the Supreme Court of the United States.

The injustice of applying an iron rule of law, established for the convenient settlement of accounts between individuals and partnerships, to similar transactions between governments and corporations and their agents, so as to impose upon the last securities the burthen of every default committed by their principal, whether during the term of their responsibility or that of their predecessors, is most obvious and apparent, and could only be tolerated because of some great principle of public policy which it may be thought to promote. If an abandonment of the rule were likely to jeopardize the public interests and lead to embarrassment, in fixing the liabilities of public officers, there would be strong inducements for its enforcement, notwithstanding it might appear harsh and inequitable in individual cases. But such results should appear inevitable to authorize a court to adopt, without qualification, a rule which works such manifest injustice. May it not be assumed, that

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prompt settlements and strict accountability are more beneficial, both to the government and the agent, than the establishment of the rule in question, and that such settlements are not likely to be enforced, when it is made an object of indifference to the government, reposing with confidence on the solvency and sufficiency of existing securities, and regardless of the past?

That the sureties of the collector upon his bond are not responsible for defalcations occurring during his first term, before the commencement of their liability, is so apparent that no one denies it; but when difficulties arise in ascertaining at what period the default occurred, in the confusion of a general account running through successive terms, guaranteed by different securities, it is proposed to cut the gordian knot, by the application of a rule which works invariable injustice. We are asked to adopt a rule exactly the reverse of the general maxim, "that a public officer is presumed to do his duty," and presume him guilty of a second default in order to cure a former one.

In actions like the present, the State, county, or corporation is not exempt from the burthen imposed upon plaintiffs generally, of making out a *prima facie* case. To entitle the plaintiff to recover the amount of the defalcations during the term for which the defendants were sureties, must be shown. For this purpose, the books of the accounting officer, here called the register, are *prima facie* evidence. — United States vs. Eckford's Executors, 1 Howard, 263.

The bill of exceptions in the present case does not contain the transcript from the register's office, which were offered on the trial as a statement of the accounts between Draffen and the City of Boonville. It would seem, from the terms of the bill of exceptions, that at the expiration of the fiscal year 1839 there was an admitted *default* of \$1437. This was certainly evidence of such default, yet such evidence might have been rebutted. It might have appeared that this default was only nominal; that, in fact, there had been at that time no funds collected, or if collected, that they had been subsequently paid over.

We understand the case of Seymour vs. Van Slyck, (8 Wend., 420,) and United States vs. Eckford, as settling this principle. If the money collected or paid over subsequently to the period when the responsibility of the present defendants commenced, consisted of monies accruing from the revenue of 1839, and charged against the collector for that year, they are not entitled to the benefit of such payments. In the cases above-cited, the application of the principle was obvious enough, and the facts as easily ascertained. In the last-mentioned case, payments into the treasury of monies *accruing and received* in the second term, were not allowed to be applied to the extinguishment of a balance due at the end of the first term, and for the same reason, payments made in the term subsequent to the one for which the defendants were responsible, if monies received on duty, bonds, or otherwise, which remained charged to the collector as of the preceding official term, were allowed as a credit to the defendants. So, in the case Seymour vs. Van Slyck, the defendants were credited with monies paid subsequently to the term for which they were liable, upon their showing that such payments were of moneys received prior to the expiration of their term. In each of these cases, the

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collector's books could be resorted to, for the purpose of ascertaining in what terms the monies were received by the collector.

The duties of these federal and state officers, the collectors of the customs, and the collectors of the tolls upon the Erie Canal, are essentially different from those imposed upon our State, county, and corporation collectors, and the mode of transacting their business and settling their accounts is not the same; and it would be a misapplication of the principle, settled in the New York and Federal courts, to adopt the broad rule contended for by the defendants in this case, that all moneys paid in by the collector after the 3d of March, 1840, shall, in the absence of all proof, be presumed payments of the revenue of 1840.

Indeed, it would be impracticable, we think, to lay down any general rule by which a court or jury must, in such cases, be governed, without regard to circumstances.

Cases may be readily imagined in which the operation of such a rule would be as inequitable as the rule which we have declined adopting, in relation to the imputation of payment. A collector, a few days or weeks after the commencement of his second term, and before he has received the tax books of the second year, makes, we will suppose, a large payment, a default appearing charged against him for the former term. It would be a violent presumption to suppose that such payment was designed to anticipate a liability not yet created. In such a case, a court would be warranted in applying such payment to the previous indebtedness. So, in the case of *Seymour vs. Van Slyck*, a correspondence between the amount paid in and the amount charged at a previous settlement, was held such a coincidence as to warrant a belief that the payment was intended to extinguish the charge.

It may, however, be soberly said, that we will, in such cases, presume that an officer does his duty, until the contrary appears; and, therefore, when the officer is in the receipt of the revenue of a specified year, and chargeable with it, we will presume, in the absence of all proof on the subject, that payments made during that year are designed to extinguish the liabilities of that year: but in the absence of all proof of intention, payments made in the year 1840, before the collector was charged with the revenue of that year, must fall within the rule adopted in ordinary cases, and the payments be imputed to extinguish the oldest item of indebtedness.

The judgment will be reversed, and the cause remanded.

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The judgment of the Circuit Court in this case was affirmed by a division of the Court.—See same case in 5 Mo. Rep., 141, and 6 *Ibid.*, 444.

APPEAL from Cooper Circuit Court.

HAYDEN and DAVIS, for Appellant.

1. In order to entitle the complainant to a decree against the defendants for a specific performance of the contract for the lot in question, it devolves upon him to show that he has fully paid for the lot, as stated in his original bill of complaint; or that he has fully satisfied the plaintiff therefor, under the alleged agreement and settlement of accounts, as set forth in his said amended bill of complaint. By the evidence in the cause, he has not sustained the allegations in either bill.

2. A decree for a specific performance of a contract is a matter in the sound discretion of the court; and unless the court be satisfied, from all the circumstances, that the claim of complainant to the decree prayed for be fair, just, and free from all fraud and circumvention on the part of complainant, the court cannot, upon principles of equity, interpose in his behalf, but will leave him to his remedy at law.—6 Johns. Chan. Rep., 223, *Seymour vs. Delancey*, and authorities there cited; 1 Maddock's Chan. Rep., 405; 2 Peters' Cond. Rep., 116; 1 Bacon, 110, 111; 5 Peters, 276, *Cathcart and Others vs. Robinson*; 2 Johns. Chan. Rep., 23, *Osgood vs. Franklin*; 2 Cowen, 139; 3 Cowen, 504.

3. If the facts of this case, as shown by the testimony, satisfy the mind of the chancellor that the complainant, by fraudulent representations to the defendants, Moore & Porter, procured from them an agreement to settle, and an actual settlement of the account for carpenter's work done upon the house mentioned in the amended bill, and by such fraud and false representations obtained from them, Moore & Porter, an allowance for a larger sum of money than the work was actually worth, then the complainant has no right to set off the amount so allowed against the price which he agreed to pay for the lot.

4. The court erred in refusing to permit the defendants to show, by the deposition of Luther Carter, that the work done upon the house of defendants was only, by admeasurement, worth \$865 56, as also in rejecting the testimony of James Carter and Jesse Homan, as offered by defendants.

5. The court erred in permitting James Huston, one of the defendants and an interested witness, to testify in the cause.

ADAMS and LEONARD, for Appellee.

1. Huston was properly received as a witness.—See 1 Phillips' Ev., 63, in notes; 1 Johns. Rep., 556, 576, 577, *Beebe and Others vs. Bank of New York*;

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Trustees of Huntingdon vs. Nicoll, 3 Johns. Rep., 566; 2 Johns. Chan. Rep., 550, 626; 1 *Pierre Williams*, 596, in point.

2. There was no foundation laid in defendants' answer to open and surcharge the settlement alleged in the amended bill.

3. The settlement was conclusive, and could only be opened upon the ground of fraud positively charged and proved, or for errors or mistakes specifically set forth and alleged in the answer.—*Fonblanque's Equity*, 32, and 439, in notes; 1 *Mad-dock's Treat.*, 102, 103; *Comyn on Contracts*, 473, in notes; 2 *Marshall*, 338; 2 *Starkie's Ev.*, 18, 19; *Stoughton vs. Lynch*, 2 Johns. Chan. Rep., 217; *Slee vs. Bloom*, 20 Johns. Rep., 689; 1 *Story's Eq.*, 497, 501; *James vs. McKennon*, 6 Johns. Rep., 559; *Lyon vs. Talmadge*, 14 Johns. Rep., 516, side page; 3 *Wend.*, 653; 2 *Tucker's Com.*, 417.

4. The evidence rejected by the court was irrelevant to the issue.

NAPTON, J., delivered the opinion of the Court.

This was a bill in chancery to compel the conveyance of a lot of ground in Boonville. The bill, answers and replications, are not materially different from what they were in 1840, (see 6 Mo. Rep, 445,) and I shall therefore refer to that opinion for the statement of the issues involved. The only issue, as I then thought, presented by the bill and answers was, whether the settlement between the defendants and Huston and McCullough was final, and embraced the whole amount of the bill of items furnished, or was only partial and conditional, to be subject to a subsequent re-adjustment of the account, and regulated by a new admeasurement of the work.

On the hearing of the case, the Circuit Court confined the testimony to this issue, and refused to hear evidence conducing to prove the exorbitance of sundry items in the bill of charges upon which the alleged settlement was founded, and the action of the Circuit Court in this particular was approved in the opinion given in 1840.

I am still unable to perceive any reason for changing that opinion. The complainant alleges, in his bill, that there was a final settlement between the parties, and that his note to the defendants, for the price of the lot, was embraced in this settlement. The defendants insist that there was no such settlement; they admit that they had a partial settlement, to the amount of \$858; but aver, that the note for \$340 (given for the lot) was retained to secure them against errors in the settlement or accounts, and that this settlement was made with an understanding between all the parties that the work was to be re-measured and priced by disinterested carpenters, and the bill to be regulated accordingly. If the complainant fails to establish a settlement, such as charged in the bill, he is not entitled to a decree. In this event an inquiry into the correctness of the charges made in the bill of items becomes unnecessary. Proof that there is no settlement, no account stated, examined, and accepted, is sufficient to defeat the bill. On the other hand, if the settlement was established or admitted, to authorize the defendants to open that settlement, and "surcharge and falsify" the account, the defendants must

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distinctly charge the mistakes or errors of which they complain.—4 Vesey, 411; *Stoughton vs. Lynch*, 2 Johns. Chan. Rep., 218.

The defendants, however, do not admit any settlement; no basis is laid for any allegations relative to the falsity or exorbitance of the charges; no distinct and substantive allegations of this character are contained in the answer, and consequently any proof in relation to such matters would be irrelevant to the issue.

The only question remaining to be determined is, whether upon the bill, answer, and evidence in the cause, the Circuit Court was justified in the conclusions to which it arrived, that a final settlement was made between these parties. The details of the testimony are as follows:—

Huston, a witness on behalf of complainant, testified, that in August, 1836, he undertook the building of a house for the defendants, Moore & Porter; that about the month of September, complainant, McCullough, entered into partnership with him in this job; that the work was finished in March, 1837; that after the completion of the work, witness and McCullough made out their bill of charges, which amounted to \$1198 70, and went to Moore & Porter's shop to settle; that Moore & Porter objected to the bill, as too high; that there was much dispute about the prices; that witness professed his readiness to correct errors, if any existed, but the errors he alluded to were errors in the extension and addition of the account; that defendants proposed that the work should be measured and priced, to which witness assented, but McCullough objected; that the matter was finally settled, and the account equally divided between witness and complainant, without objection from the defendants; that Moore & Porter paid to witness his part of the bill, amounting to \$599 35, and settled with McCullough, by paying him some eighty dollars in cash, then deducting the price of the lot mentioned in the bill, and executing their note to him for the balance. The witness understood the matter to be finally settled, and the lot paid for. Witness further stated, that after this settlement McCullough demanded his note for the purchase money of the lot, but Moore & Porter refused to let him have it; he then demanded their note as a set-off against his note, to which Porter assented, provided it should be expressed that it was given for the work done on the house; that Porter thereupon commenced writing a note, with a statement of the consideration for which it was given, but McCullough said he would have none but a plain note; that the accounts were frequently added, and no errors of addition discovered.

Hood, another witness for complainant, testified, that on the 3d December, 1836, when the bond for the title of the lot was made by Moore & Porter, McCullough was about to leave the room, without giving his note for the purchase money, when he turned back and observed he had not given his note, but would do so; to which Moore replied, that it was hardly necessary, as he expected that he, McCullough, had already paid for the lot.

Purdin, a third witness for complainant, stated, that he had a conversation with Porter shortly after the completion of this carpenter's work by McCullough and Huston, and that Porter told him they had settled; that the charges were high, but rather than have a law suit they had settled, and given McCullough a lot in part payment.

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Williams, a witness on behalf of defendants, deposed, that he was present at the settlement, or attempt to settle; that *Moore & Porter*, after objecting to the charges, proposed that the work should be measured and priced by disinterested carpenters, to which *Huston & McCullough* assented, provided it was done at the expense of said *Moore & Porter*; that *Moore & Porter* thereupon paid all the bill, except \$340, (the price of the lot,) which they held back to make themselves safe, in case the work should be ascertained, upon measurement, to be overcharged. To this *Huston & McCullough* agreed, but *McCullough* wanted a note from *Moore & Porter* to show that this \$340 was coming to him. *Moore & Porter* at first refused, but *Porter* wrote a note stating the reasons why it was given, which *McCullough* declined receiving.

On cross-examination, this witness states that *Moore & Porter* settled one-half the bill with *Huston*, and the other half with *McCullough*; that *Huston* had nothing to say about the price of the lot; that nothing was said about keeping back *Huston's* half, or any part thereof; that separate notes were given to *Huston* and *McCullough*. In answer to a question, whether the note for the purchase money was not withheld, because *Horseley Rea*, who had the title, was not in *Boonville*, and no deed could then be made, witness answered, that, "It was named that they could not make a deed at that time, as *Rea* was gone." Witness also stated that *McCullough* demanded a deed for the lot, but did not recollect the reply given to this demand by *Moore & Porter*. Witness spoke from recollection, but had written notes in a book, from which he admitted he had refreshed his memory. Witness was 23 years old, was a nephew of *Porter*, and was his apprentice when this settlement was made.

Newbold, another witness for defendants, stated that he was in the employment of *Moore & Porter* when the complainant and *Huston* presented their bill; that *Moore & Porter* insisted that the work was charged too high; that there was much dispute on this subject; that *Huston* and *McCullough* promised repeatedly during the settlement to correct errors if any appeared; that witness was absent some twenty minutes, and on returning found the parties writing notes. *McCullough* demanded his note for the purchase money of the lot, but *Moore & Porter* refused to surrender it. *McCullough* then asked a note for the same amount, and *Porter* was willing to give such a note, provided it was expressed in the note for what consideration it was given, but *McCullough* refused to accept such a note; that the parties broke up in anger.

Moore, a witness, testified that he was in the room about the close of the settlement spoken of, and that *McCullough* appeared to be "in a pout," and that he understood the work was to be measured and priced.

Cranmer, another witness, testified that, a short time after this settlement, *Moore & Porter* informed him that, at the settlement, it was agreed on that the work was to be measured and priced by disinterested carpenters, and all errors, if any, were to be corrected; that witness thereupon called on *Huston* and *McCullough*, and informed them what *Moore & Porter* had said; to which *Huston* replied, that he had always been, and still was, willing to have the work measured and priced, but *McCullough* said the matter had been settled; that he had no objection to the

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work being measured, but no man should price his work. Witness then told McCullough & Huston, that Moore & Porter had informed him that this was the understanding when they settled; to which McCullough replied, "By G—d, the notes did not show that."

To arrive at any satisfactory conclusions from this mass of contradictory testimony alone, is not an easy matter. Let us revert to the answer of the defendants, and see what facts are admitted, and what denied.

The answer denies that the defendants agreed to pay one-half to Huston, and the other half to McCullough; but avers, that they positively refused to settle, unless upon the understanding that the work was to be measured and priced.

The answer denies that they knew any thing of the partnership between McCullough & Huston until they were called on for a settlement; and avers that they looked to Huston alone, as the responsible person with whom they contracted; admits, however, that they were informed of this partnership when the settlement was made, and that they paid to Huston one-half of the bill, and to complainant about \$259, being the balance of his share, after deducting the price of the lot; admits that McCullough demanded a note for \$340, but declares that they refused to give any note unless upon considerations expressed, &c.

How, then, does this transaction appear, as it is set up in the answer? Here it is admitted, that defendants knew, at the time of the attempted settlement, of the copartnership between McCullough and Huston, and that Huston was entitled to one-half of the bill, and McCullough to the other half; it is admitted that there was a final settlement, so far as Huston's half was concerned, and that they also gave their note to McCullough for a sum which, when added to the \$340, (the price of the lot) exactly amounts to his half of the account. This transaction, by itself, unaccompanied with any other acts or declarations, would seem to constitute a complete settlement of the account, except so far as the note for the \$340 is concerned, and the defendants accordingly aver, that this note was retained by them, with the consent of McCullough & Huston, to secure them, in the event an abatement of prices should be affected, by the measurement of the work, which was agreed upon between all parties.

It must be apparent, that this history of the transaction is intrinsically improbable, and unless established by clear and undisputed testimony, would not be likely to gain credence. It may be, that the defendants retained the note for \$340 with the intentions and views which they avow in their answer; but it is most unreasonable to suppose that McCullough had any such expectations, or consented to any such arrangement. Would McCullough stand by and see his partner paid off in money or notes, to the full amount of his part of the bill, and agree to accept only a part of his share of the account, with an understanding that all deficiencies to be discovered in the new measurement agreed upon should come out of his share?

It is not a little singular that the defendants should have paid off Huston, who is declared in their answer to have been the only one responsible on the building contract, and the person to whom they looked alone for the proper completion of the job, and retain their hold only on the subordinate, McCullough, whom they

professed not to know in the business, until they were informed, at the settlement, of the extent of his interest.

If we look at the testimony, it must be acknowledged that there is a good deal of contradiction; but I think the statements of most of the witnesses may be reconciled with the hypothesis of a final settlement, but cannot be reconciled with the statement the defendants desire to establish.

The deposition of Williams is direct and positive to establish the understanding set up by defendants, that there was a new measurement agreed upon, and that this note for the lot was not embraced in the settlement. The testimony of Huston is direct and positive to the contrary. Laying aside the statements of these two witnesses, who we may suppose were not altogether impartial and unbiassed observers of this transaction, the testimony of Purdin, of Newbold, Cranmer and Moore, may be easily reconciled.

Newbold states that there was a good deal of disputation and angry words passing between these parties, during the entire time occupied in attempting to settle; that he was absent for some time, and on his return found the parties engaged in writing notes, and that McCullough demanded his note for the purchase money of the lot.

Here it may be remarked, that Williams testified, that McCullough & Huston agreed that this note for the lot should be retained by Moore & Porter, to secure themselves. It is remarkable that McCullough should, when the settlement of his share was about being arranged, have the effrontery to demand what he had just before agreed should be retained by Moore & Porter.

The testimony of Huston corresponds, in this particular, with that of Newbold. They agree that McCullough demanded his note; and that though Moore & Porter refused to give it up, yet they proffered him a note of corresponding amount, provided the consideration should be expressed on its face.

The witnesses not only agree as to this important fact, but the answer admits that they offered to McCullough a note for the same amount as the one they held on him for the lot.

The circumstance of the retention of this note by Moore & Porter, is the only fact in the case which we think militates against the supposition of a complete settlement. If this can be accounted for from other disclosures made by the witnesses, there can be no difficulty in concluding that there was a settlement.

There is no evidence as to the real motive of these parties in retaining this note. It may be that it was done with the intention and understanding avowed in the defendant's answer; but to suppose that this was the real and avowed motive, would be to suppose a fact which we have seen is utterly inconsistent with every other fact in the case. The testimony of Williams, one of the defendant's witnesses, enables us to suppose a motive consistent with a settlement. It appears that Rea, who held the legal title of this lot, was absent when this settlement was made; and if we suppose that the defendants were unwilling to part with this note, until they could take up their bond by giving a conveyance for the lot, the hypothesis is not inconsistent with the other circumstances. Williams says, that something was "named relative to Rea's absence."

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It is true that the conduct of the parties in this particular, supposing this to have been the true reason for their withholding the note, is not such as would have occurred in a transaction between persons conversant with their legal rights and liabilities; but these parties were not lawyers, and might, naturally enough, have concluded that it was fair and right that the title bond and note should be delivered up at the same time.

The testimony of Cranmer only tends to show, that Moore & Porter, some short time after the settlement, regarded their possession of the note as authorizing them to open this settlement; and represented to Cranmer that such was the understanding of all the parties when the settlement was made. The answer of McCullough, when this communication of Moore & Porter's intentions was made to him, shows that it was very far from being so understood by him. When the witness informed him of the defendants' wish to have the whole work re-measured and priced, he said he had no objections to the measurement, but that no man should price his work; but when informed that Moore & Porter declared this to be the agreement made at the settlement, the language of his reply evinces astonishment and indignation. It would seem that he was then, for the first time, aware of the defendants' motives in retaining his note.

Upon the whole, it must be conceded, that there is much of this testimony which cannot be reconciled with any reasonable hypothesis, and must be rejected as the result of inattention, prejudice, or a wilful perversion of the truth. Questions of this character could be more satisfactorily settled by a jury, when by oral examinations the credibility of the witnesses can be better tried than upon written testimony. But this is a matter of discretion with the chancellor; and as two successive courts have passed upon this case, and in each instance decreed for the complainant, I feel strengthened in my present convictions that the decree is right.

Judgment affirmed.

TOMPKINS, Judge.—I do not concur in this opinion.

SCOTT, Judge.—I did not sit in this cause; and the judgment of the Circuit Court is affirmed by a division of the Court.

CRUMP ET AL. vs. McMURTRY.

A. sold a tract of land to B. and took his notes, without any security, for the payment of the purchase money, and retaining only the lien on the land given by him, to secure the payment of the notes. Apprehensive that the land sold would be insufficient to pay the purchase money, A. instituted an action on the note for the second instalment, and attached certain personal property of B., of the value of \$1,000, who, in consideration of the release of the property attached, executed a bond, with sureties to A. for \$1,000, as collateral security for a like amount for the note on which the suit was brought. Judgment was then rendered for the amount due on the note.

At a subsequent term of the court, judgment was obtained on the third note. Upon these judgments, executions were issued, and the tract of land levied upon and sold. The judgment creditor applied the proceeds of the sale, first, to the satisfaction of the execution issued on the last judgment, and the remainder was credited on the execution issued on the first judgment, leaving a sum exceeding the amount of the bond due on such execution.

The sureties in the bond, against whom judgment had been obtained at law, filed their bill for an injunction, &c., contending that, as the judgment for the amount of the second instalment was a lien upon the land sold, they had a right to be substituted, in relation to this lien, in the place of A., the judgment creditor, who, having discharged the land from the lien by the sale under the execution, thereby released the sureties in the bond. *Held:*

1. That the sureties in the bond had no right to be substituted, in relation to the lien on the land, in the place of the judgment creditor; that A., in giving up the lien of his attachment for the bond, became a purchaser of the bond for a valuable consideration; that the doctrine of substitution was not applicable to a case like the present, where a creditor having a security for his debt, but fearing that it will prove insufficient, obtains additional security. To apply the doctrine of substitution to such a case would defeat the obvious intention of the creditor in obtaining such additional security.
2. The term *collateral*, applied to the security of a third person, does not, *ex vi termini*, confer a right in equity to substitution. Its signification is not technical, and as used by the parties to this suit merely meant *additional* or *supplemental*.
3. The rule in equity is, that if an individual is security for a debt, and the creditor has a lien on property as collateral security for the payment of the debt, and the surety discharges the obligation of his principal, he should be substituted for the creditor, and have satisfaction out of the property collaterally bound for the payment of the debt. The present is a case where a surety is not asking to be substituted for a creditor who has collateral security for his debt, but one security is demanding to be substituted for the creditor, in relation to another security, when the effect will be to deprive the creditor of one of his resources, and thereby cause a partial loss of his debt.

APPEAL from Callaway Circuit Court.

LEONARD and ANSELL, for Appellants.

FIRST VIEW.

By the agreement of June, 1838, between McMurtry and McClelland, the \$1,000 bond of January, 1838, became and was collateral security for a similar amount of the \$1,920 note payable in 1837.

And although the sureties upon the \$1,000 bond were not parties to the agreement of June, 1838, yet, by the rules of equity, they are as fully entitled to every

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benefit under it as if they had actually executed it themselves.—1 Story's Equity, 320, 321; *Hayes vs. Ward*, 4 Johns. Chan. Reports, 123; *Mayhen vs. Crocket*, 2 Swonst. Rep., 186.

Assuming these two propositions to be true, the complainants take three positions, and insist, that under either of them they are entitled to relief.

FIRST POSITION.

1. The satisfaction of the judgment of October, 1838, effected by the proceedings of the sheriff of Callaway county, extinguished the \$1,000 bond.

2. And this extinguishment of the judgment of October, 1838, is not annulled by the proceedings of the Callaway Circuit Court quashing a part of the sheriff's return on the execution.—*Schober vs. Dedman*, 2 Littell's Rep., 116; *Trigg vs. Lewis' Executors*, 3 Littell's Rep., 132, 133.

SECOND POSITION.

1. The judgment of October, 1838, was a lien on the land sold, and therefore

2. The sureties on the \$1,000 bond had a right to be substituted in relation to this entitled to payment in preference to the judgment of November, 1839.

lien, in the place of McMurtry, the judgment creditor.—*Watson and Others vs. Kenney*, 3 Leigh's Rep., 272; *Classon vs. Morris*, 10 Johns. Rep., 539; *Theobald on Principal and Security*, 186; *Parsons vs. Bridgock*, 608.

3. And McMurtry having, by the sale under execution, discharged the land from the lien, thereby released the securities.—1 Story's Equity, 322-480, *Cheeseborough vs. Millard*, 1 Johns. Rep., 413; *Theobald on Principle and Security*, 95. (This book is marked on the back, "Principal and Agent.")

THIRD POSITION.

1. By the express terms of the agreement of June, 1838, an equitable lien upon the land was created for the security of the two notes, upon which the judgment of October, 1838, was recovered.

2. The sureties on the \$1,000 bond had a right to be substituted in relation to this equitable lien in the place of the creditor, McMurtry.

3. And McMurtry having, by his execution sale, discharged the land from this lien, thereby exonerated the sureties.

SECOND VIEW.

Admitting the \$1,000 bond not to be collateral security for a portion of the \$1,920 note payable in 1837, but altogether an independent obligation, yet the counsel for the complainants insist, that they are entitled to relief upon the following grounds:—

1st: The judgment of July, 1839, upon the \$1,000 bond, was a lien on the land sold, and entitled to payment before the judgment of November, 1839.

2nd: The complainants, who are admitted to be McClelland's securities on the \$1,000 bond, have a right to be substituted in relation to this lien, in the place of McMurtry, the judgment creditor.

3rd: And McMurtry having, by the execution sale made at his instance, discharged the land from this lien, thereby released the securities.

Todd and SHEELEY, for Appellee.

1. The note in controversy was given upon consideration of releasing the attachment, and surrendering part of the attached property, and forbearing the debt; such consideration is legal, and the contract an absolute, original undertaking, not conditional nor collateral.

2. The contract, for its being a payment for and to be credited upon a note held by defendant, upon the principal obligor, for a different consideration; is a discharge of that sum; and will be considered as *done* in equity; and such contract will not be impaired, or varied by parol proof or declarations, after its execution.

3. The fact of the sheriff, against the consent and instructions of the plaintiff in the execution upon the judgment for the larger note, upon which the credit was to be endorsed, out of money made upon other executions between the same parties, and to which he was directed to apply the money, will not, in equity, cancel the contract of the application of the payment of the small note, nor discharge the obligor of such note.

4. The court out of which the execution issued having quashed the return of satisfaction is obligatory upon the parties to the execution, and the record of such fact cannot be impeached by circumstantial evidence, by a record in another case, or by any extrinsic, written, or parol evidence; and by none but parties or privies to it.

5. No decree can be given for complainants: that they are discharged from the note in controversy, by reasons of any contract made by obligee with principal obligor of the note in controversy, to delay payment of the principal note, or the note for future instalment, because there is no allegation of the contract alleged, being without the consent of the securities, nor proof of any such facts, neither is there any allegation or charge of any facts constituting a delay.

6. Neither can a decree be rendered for complainants, substituting them to any equitable lien of the defendant for the purchase money on the original contract; because they do not allege, charge or prove, that they paid the note they profess to have given as collateral security to the note in the original contract.

7. If the original note was to be credited by the note with personal security, or if it be a note as collateral security for it, it operates as a discharge *pro tanto* of the purchase money, and releases the lien of vendor upon the land, and no lien can be remitted to the complainants.

The complainants were not collateral securities to the original note for the purchase money, or any part, nor privies thereto; having made no contract to guarantee or assume the payment of it, or any part, but for its extinction.

8. If the contract of June, 1838, of McMurtry and McClelland, revived the extinguished lien for the purchase money, then the complainants, claiming a substitution thereto under that contract, must take it subject to all the terms.

If, under any consideration, they be entitled to substitution, they have no equity to take precedence or equality with vendor, but must be postponed; for the vendor enforced the payment of his lien fairly, and without prejudice to complainants.

Crumpet al. vs. McMurtry.

SCOTT, J., *delivered the opinion of the Court.*

This was a bill in chancery filed by T. Crump, N. E. Branham, and others, securities in a bond executed by them, together with J. M. McClelland and Compton, to Levi McMurtry. McClelland, the principal in the bond, and Compton, one of the securities, were made defendants together with McMurtry. The facts, as stated in the bill, are as follows: McMurtry sold a tract of land to McClelland for \$5,760, to be paid by three equal instalments of \$1,920 each, on the 25th October, 1836, 1837, and 1838. These instalments were secured by the notes of McClelland. Most of the first instalment was paid, and in January, 1838, McMurtry commenced suit by attachment for the recovery of the balance of the first instalment and the second instalment. The attachment was levied on nine horses and other personal property of McClelland. It was afterwards agreed between McMurtry and McClelland, that if McClelland would secure a thousand dollars of the note for the payment of the second instalment then in suit, with personal security bearing ten per cent. interest, McMurtry would accept the same in lieu of, and as collateral security for, an equal amount of said note, and would release the horses from the attachment. Accordingly, afterwards, on the 4th January, McClelland, as principal, and the complainants, together with the defendant Compton, as securities, executed their bond to McMurtry, due twelve months after date, with ten per cent. interest. This bond was delivered to McMurtry, who released the horses from the attachment. After, in June, 1838, it was agreed between McMurtry and McClelland, that the latter should withdraw his plea in abatement of the attachment, and plead to the merits, and that McMurtry should pay all the costs incurred by the attachment; that, at the ensuing term of the court, McMurtry should have judgment for the balance due on the two notes, after allowing all credits to which McClelland, on settlement, was entitled; that the personal property then subject to the attachment should be sold, and the proceeds applied to the satisfaction of the judgment to be rendered at the ensuing term; that, if the bond for \$1,000, of the 4th January, 1838, should be paid, the amount should be credited upon the judgment to be taken, and that the said bond was collateral security for so much of the second instalment; that the judgment to be taken, when satisfied, would operate as an extinguishment of said bond, and that the land sold was bound in equity for the two notes then in suit, but should not be sold under execution upon the judgment to be obtained in the suit then pending. In pursuance of this agreement at the October term, 1838, judgment was rendered against McClelland for \$1,994 95, besides costs. At the July term, 1839, judgment was obtained on the bond for \$1,000, against McClelland and his securities; and at the November term of the same year, a recovery was had on the note for the last instalment. The proceeds of the sale of the personal property taken under the attachment, amounting to \$480, was applied in part satisfaction of the judgment of October term, 1838. In April, 1840, McMurtry sued out executions on the three judgments, by virtue of which the land sold by McMurtry to McClelland was levied upon, and, at the July term, sold for \$2,400. This sum was, by the sheriff, first applied in satisfaction of the judgment of October, 1838, the execution

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on which was returned satisfied, and the residue, amounting to \$607, was applied to the judgment on the note for the last instalment. The prayer of the bill is, that the judgment on the bond for \$1,000 be declared to be extinguished, and the collection thereof be perpetually enjoined and for general relief.

McMurtry answers, and denies that the bond for \$1,000 was given or received as collateral security for a like amount of the note for the second instalment. He denies that he authorized the sheriff to apply the money arising from the sale of the land in the manner it was done, and avers, that he instructed the sheriff to apply it, first, in satisfaction of the judgment on the note for the last instalment, and the residue to the judgment of October of 1838. He further states, that he instituted proceedings in the Callaway Circuit Court to correct and amend the returns of the sheriff to the several executions, which resulted in an order of the court, setting aside so much of the return on the execution on the judgment of October, 1838, as states that it is returned satisfied; and so much of the return on the execution issued on the judgment rendered in the suit on the note for the last instalment, as applies the residue of the money arising from the sale of the land, is also set aside, leaving the facts of the levy and sale contained in the return on the execution on the judgment of October, 1838, remaining on the same. The other facts charged in the bill are admitted by McMurtry. McClelland, in his answer, admitted the facts charged in the bill, and the same were taken as confessed against Compton.

After the execution of the bond of the 4th January, 1838, for \$1,000, by McClelland and his securities, McClelland took from McMurtry the following receipt, viz.:—"Received of Mr. J. W. McClelland a bond, with the following securities: T. Crump, N. E. Branham, V. D. Boone, B. G. D. Mosley, and Compton—for \$1,000, which I promise to credit J. W. McClelland's bond that was due to me in October, 1837.

"LEVI MCMURTRY."

The following is so much of the agreement of June, 1838, referred to in the bill, as is deemed material. If McClelland and his securities will further secure, if McMurtry requires it when due, a note for \$1,000, its payment shall be extended at same interest due in January next, for twelve months. If it be paid, it is to be a credit on the amount of the above-named judgment, (the judgment of October, 1838,) as it stands as collateral security to the note sued upon for that amount, and McMurtry is not to sell McClelland's land in Callaway county, now in McClelland's possession, under the execution on the judgment to be given at the next term, this land being now bound in equity for the payment of the notes sued upon. If the judgment to be rendered at the next term be fully paid, it extinguishes the note mentioned above for the payment of a \$1,000.

On the hearing, the court entered a decree dismissing the bill, from which the complainants appealed.

The complainants insist, that by the agreement of June, 1838, between McMurtry and McClelland, the bond for a thousand dollars became collateral security for a like amount of the second instalment, and that although the securities to the bond were not parties to that agreement, yet in equity they are entitled to all advantages secured by it, as fully as though they had executed it. After asserting this prin-

ciple, they maintain, that the judgment of October, 1838, was a lien on the land sold, and therefore entitled to payment in preference to the judgment of November, 1839; that the securities in the bond for \$1,000 had a right to be substituted, in relation to this lien, in the place of McMurtry, the judgment creditor; and McMurtry, by the sale under the execution, having discharged the land from the lien, thereby released the sureties.

It is a clear principle in equity, that if a creditor has personal security for a debt, and also an incumbrance on property of the debtor, to secure the payment of it, if the surety satisfies the debt, he shall be substituted for the creditor, and have an indemnity out of the property which was collaterally bound to secure the same; and if the creditor, acting in bad faith, by any means, destroys this recourse of the surety, he will thereby be discharged. As the surety, by paying the debt of his principal, becomes in turn a creditor of the debtor, it is nothing but equity that he should seek his indemnity out of the property which had been appropriated for the payment of the debt which he has discharged. This principle is one of pure equity, and is founded on the dictates of refined justice. It is not intended to be applied in all cases where there is a collateral security for a debt, but in those only in which justice demands its application. To apply it indiscriminately, without regard to circumstances, would be to convert a mild rule of equity into one of stern law, working its way regardless of the injustice which may follow.—1 Johns. Chan. Rep., 409.

It is above stated, that the complainants assume that the judgment of October, 1838, was a lien upon the land sold, and entitled to priority of satisfaction. That judgment may have been a lien on the land, but it could not displace that which existed anterior to its rendition. It seems to be well settled, that a vendor of real estate retains a lien for the purchase money on the estate sold, whether he has executed a conveyance or not. This principle is supported by a current of authority which cannot be resisted. (*Cole vs. Scott*, 2 Wash.; 2 Story's Equity sec. 12, 13; 2 Sugden on Vendors, 57.) It will follow, then, that although the judgment of October, 1838, was a lien, yet it attached subsequently to the prior lien for the amount of the purchase money secured by the note for the last instalment, and notwithstanding that judgment, the land was bound for all the purchase money remaining unpaid. McMurtry might have satisfied the judgment of October, 1838, by a sale of the land, and thereby extinguished the bond of the complainants. But this was not done. That judgment remained unpaid until a judgment was rendered on the note for the last instalment, and having two judgments, they were subject to his control, and he might have the money arising from the sale of the land under them applied as he thought proper, unless the rights of third persons were concerned. This renders necessary the inquiry whether the complainants, as sureties on the bond for \$1,000, had a right to interfere and control McMurtry in the application of the proceeds of the sale of land. If such a right exists, it must have its foundation in the doctrine of substitution, or it must be by contract.

The principle of equity is this: if an individual is security for a debt, and the creditor has a lien on property as collateral security for the payment of that debt, if the surety discharges the obligation of his principal, he shall be substituted for the

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creditor, and have satisfaction out of the property collaterally bound for the payment of the debt. The case under consideration does not fall within this principle. A surety is not asking to be substituted for a creditor who has collateral security for his debt, but one security is demanding to be substituted for the creditor in relation to another security when the effect will be to deprive the creditor of one of his resources, and thereby cause a partial loss of his debt. A vendor sells a tract of land, and takes three notes of the vendee for the purchase money, payable in annual instalments. Taking no security other than the notes of the vendee for the purchase money, he retains the lien given by law to secure its payment. Apprehensive that the estate sold will be insufficient to pay the purchase money, he institutes an action on the note for the second instalment, and attaches property of the vendee worth a thousand dollars, and in consideration of the release of that property from the attachment, a bond is given for a thousand dollars as security for a like amount of the note on which the suit is brought. This is the case of a creditor having a security for his debt, and fearing that it will prove insufficient, he obtains supplemental security, and then the supplemental security asks to be substituted in the place of the creditor as to the other security, thereby defeating every advantage the creditor had obtained by taking the supplemental security.

In reviewing this transaction, will not a court of equity regard the bond of the complainants as the property for which it was substituted? But for the bond of the complainants, McMurtry would have had the horses as additional security for his debt; and can the substitution of the bond for the horses make any difference in equity? The complainants, by their interference, induced McMurtry to release a lien on property worth the amount of their bond, and now that they seek to be discharged from the obligation, some equitable circumstance should be shown other than that the security into which they entered was termed *collateral*.

If this case furnishes no circumstances which would warrant a court of equity in extending to the complainants a right to substitution, is there anything contained in the covenant between the parties of June, 1838, which will give them this right? That instrument recites, that the bond of the complainants stands as collateral security to the note sued upon for that amount; that the land sold is now bound in equity for the payment of the notes in suit; and that, if the judgment to be rendered on the notes be fully paid, the bond of the complainants will be extinguished; and it is agreed that the lands sold by McMurtry to McClelland shall not be sold to satisfy the judgment to be rendered on the notes then in suit.

McMurtry, fearful that the land sold would not be a sufficient security for the purchase money, instituted proceedings, by attachment, for the recovery of a part of the first, and the whole of the second, instalment. Property other than the land, to the amount of a thousand dollars, is attached; and the complainants, in order to obtain a release of this property from the attachment, that it might be sold by McClelland, and the proceeds paid to McMurtry, entered into the bond which is the subject of this controversy. Afterwards, an argument is entered into, between McMurtry and McClelland, in which the recitals and stipulations above set forth are contained. It is under this agreement that the complainants seek relief against the bond which they have executed. It may be remarked on the terms of

the instrument, that the parties do not contract, in express words, that the bond of the complainants shall be collateral security, and that the land sold shall be bound in equity for the payment of the notes sued upon; but these are simply announced as facts. What could have been the object of the parties in making these declarations? The bond of the complainants was given to secure part payment of a note on which suit had been brought; and unless it was declared to be merely collateral security, the whole of the purchase money might have been recovered by McMurtry; and, afterwards, suit might have been instituted for the recovery of the amount secured by the bond of the complainants. This view of the matter is strengthened by the fact, that the parties stipulated that the land should not be sold under the judgment to be obtained on the notes in suit. If it was designed to place the note for the second instalment—for part of which the complainants' bond was collateral security—in such a situation as to have a priority of all the other notes, why stipulate that the land should not be sold for its payment? Was not the effect of that stipulation to leave the land undisturbed for the payment of the last instalment? The term "collateral," applied to the security of a third person, does not *ex vi termini* confer a right in equity to substitution. Its signification is not technical; and, as used by the parties to the covenant, in our opinion, it means additional, or supplemental. Can we suppose that, by the use of that term, it was designed to deprive McMurtry of all the advantages he had obtained by his diligence, render the bond of the complainants of no avail whatever, and place McMurtry where he was before he obtained it? It is certainly competent for a party to do such an act: any one may relinquish or release any right conferred on him by law or contract; but when we see an individual sedulously employed in securing a debt, and, just as he has obtained his end, to believe that he would relinquish it without any consideration, we should have clear and manifest language indicative of such an intent. There is nothing in the argument which would warrant us in adopting the opinion that such was the understanding of the parties. How can it be said that a right to substitution was contracted for on behalf of the complainants, when, by the payment of the bond which they executed, the lien on the land for that amount would be extinguished? What was there to be substituted to?

We have seen that the judgment of October, 1838, had no priority of the note for the last instalment; and the reason why that priority does not exist has been shown. The recital of the fact of the existence of a lien, to the amount of the two notes in suit, admitting it amounted to a covenant that the land should be equitably bound for that amount, might have the effect to preserve the lien of McMurtry on the land sold for the amount of the bond of the complainants, as otherwise such a security might be held a discharge of the lien *pro tanto*. As the existence of a lien somewhat depends on the contract and understanding of the parties to the sale, such a recital would show that it was not abandoned. (Story's Equity, sec. 1,226.) Chancellor Kent has summed up the general doctrine on this subject, as well as the exceptions to it, with great clearness. He holds, that the better opinion is—that taking a note, bond, or covenant, of the vendee himself, is not a waiver of the lien, for such instruments are only the ordinary evidence of a debt; but that tak-

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ing a note, bill or bond, with distinct security, or taking a distinct security exclusively by itself, either in the shape of real or personal property, from the vendee, or taking the responsibility of a third person, is evidence that the vendor does not repose upon the lien, but upon an independent security, and it discharges the lien. These rules he deduces from a review of the American as well as the English authorities. But although the effect of the recital was to preserve the lien of McMurtry, yet both parties knew that the land was already subject to the lien of the unpaid purchase money; and, consequently, the recital could not give the lien for the second instalment a priority over the lien on the land for the last instalment. In this respect the covenant places the complainants in no better situation than the judgment of October, 1838.

As to the point, that the judgment on the bond of the complainants was prior to the judgment on the note for the last instalment, and therefore entitled to be first paid, we deem it answered in what has been said in relation to the lien of the judgment of October, 1838.

Had the bond of the complainants been made a collateral security for the payment of the whole debt, or for the last instalment, none of the difficulties with which this cause is surrounded would have arisen: the transaction would have been plain, and easily comprehended. As it is, its peculiar circumstances render it unnecessary to determine the abstract question — whether, if a whole debt, payable in three instalments, is secured by property which is insufficient to satisfy it, and a surety, being bound for the first or second instalment of the debt, pays the same, whether he is entitled to any, or what, relief in equity, in respect to the property bound for the debt? For in this transaction, the complainants, so far as McMurtry is concerned, in whatever relation they may stand to McClelland, cannot be regarded as sureties. This is not like the case of one voluntarily becoming the surety of another for the payment of a debt: McMurtry purchased the bond of the complainants for a valuable consideration: it was given for the horses which he held for the payment of his debt, and justice and equity constrain us to regard it merely as the representative of the property for which it was substituted. We know of no principle of equity, arising out of the doctrine of contribution or substitution created for the protection of sureties, which can enable us to extend to the complainants the relief they ask.

As to the point, that the judgment of October, 1838, is satisfied by the levy and sale of the land under it, we are of the opinion that the action of the court below, in relation to the returns of the sheriff on the several executions, is sufficient to show that the application of the proceeds of the land is yet to be made. Enough of the several returns was quashed to show that the court intended to set aside the application made by the sheriff, and to leave the matter open. Had not that been the design of the court, as manifested by its action, it is hard to conceive why the complainants should be appellants here, asking relief in this form. Surely the court understood the effect of its own orders! and why should we give them a more limited construction than was intended by the power making them?

Decree affirmed.

The State, to use of Sublette and Campbell, vs. Melton et al.

THE STATE, TO USE OF SUBLETTE AND CAMPBELL, vs. MELTON ET AL.

1. In an action against a sheriff for failing to make return of an execution, the burden of proof lies upon the sheriff (defendant). The plaintiff is not bound to prove the allegation in his declaration, that the sheriff did not make return of the execution according to the command thereof.
2. Where the burden of proof lies upon one party, it cannot be thrown upon the other party by the form of the pleading.
3. The endorsement on the writ by the sheriff, showing the manner in which it was executed, and the filing of the same in the clerk's office, constitute in law the *return*.

MILLER, for Plaintiffs in error.

The plaintiff insists, that, to make a good return, the officer must certify how he executed the writ, and must make actual return of the same.—Mo. Dig., 1835, p. 254, sec. 5, 6; *Ibid.*, p. 260, sec. 52, 53.

S. M. BAY, for Defendants in error.

I. The demurrer to the second assignment of breaches was properly sustained; because—

1. The assignment sets forth two sufficient causes of action in respect of the same demand, and is, therefore, bad for duplicity.—1 Chitty's Plead., 259; Com. Dig., title, "Pleader," c. 64.

2. The plaintiffs profess, in the commencement, to assign "*a further breach*," and then set forth, in the same assignment, *two* breaches, on which there must be different judgments. The breaches thus improperly assigned subject the defendants to different penalties.—Rev. Stat., 1835, title "Executions," sec. 52, 54, p. 260.

3. If an issue had been tendered on the second assignment, and found for the plaintiff, the court would have been unable to render judgment on such finding, because *one breach*, included in this assignment, subjects the sheriff to the payment of the whole amount endorsed on the execution, and the *other breach* to a penalty of *five per cent. a-month*, &c.

II. There is a distinction between an *insufficient* return and *no return*. Upon the trial of an issue, whether an execution had ever been *returned*, the plaintiff cannot succeed by proving an *insufficient* return.—7 Bac. Ab., title, "Rescue," e.; *Ibid.*, title, "Sheriff," n.; 3 Tom. Law Dic., "Return," 388; 2 Starkie on Ev., 477.

III. The "*return*" is the endorsement of the officer on the writ, showing the manner in which it was executed. If the "*return*" means, as contended by the plaintiffs in the court below, the filing of the writ in court, or in the clerk's office, how could an officer be sued for a *false return*? &c.—5 Eng. Com. Law Rep., 2.; 3 Chitty's Prac., 647, 8, 9; 1 Monroe, 108, 9; 6 Monroe, 622; 17 Johns. Rep., 131; 2 Cowen's Rep., 477; Miller vs. Adams, 16 Mass., 456; Ma-

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ther vs. Green, 17 Mass., 60; Rev. Stat., 1835, title, "Practice at Law," art. 6, sec. 7, 3d subdivision.

IV. Admitting, for the sake of argument, that the technical "return" of a writ is the filing of the same in court, or in the clerk's office, yet the plaintiff failed to prove that the writ had not been so returned, as they were bound to do; they holding the affirmative of the issue. — 1 Starkie on Ev., 418.

V. The cause being submitted to the court, sitting as a jury, and the issues being found for the defendants, this court will not disturb the verdict, unless it should appear that the evidence greatly preponderated in favor of the plaintiff, which is certainly not the case in this instance.

TOMPKINS, J., delivered the opinion of the Court.

The State of Missouri, for the use of William Sublette and Robert Campbell, sued William N. Melton, Louis Bolton, William N. Campbell, John W. Wells, and others, securities of said Melton in his official bond, given as sheriff of Cole county on his said bond. The plaintiff assigned, as a breach of the condition of said bond, that, on the 22d day of January, 1840, he delivered to the said Melton, sheriff, as aforesaid, a writ of execution, issued by the Circuit Court of Cole county, to be executed and returned according to law; and that said Melton did not make return of said execution, according to the command thereof, &c., but wholly failed so to do. To this breach the defendants pleaded, that Melton did not fail to make return of said execution, as in said declaration is alleged, &c.; on which the plaintiff took issue.

Other breaches were assigned, to which pleas were filed; but they will be passed without notice, as the defendants did not, in the argument, rely on the issues made on them. The issue was found for the defendants on this plea:— The execution is, by law, returnable at the term of the court out of which it issued next succeeding its delivery, unless otherwise ordered by the plaintiff; and it is, also, returnable on a day specified in such execution.—See fifth and seventh sections of the act to regulate executions, p. 254 of the Digest of 1835. By the 52d section of the same act it is provided, that if any such officer shall not return any such writ, according to law, &c., such officer shall be liable and bound to pay the whole amount of money in such writ specified, or thereon endorsed, and directed to be levied. It was the duty, then, of the sheriff to return the execution on the day specified in the writ, and to endorse on the execution the day of the return. On the sheriff lay the burthen of proof; but he pleads that he did not neglect to return, &c.; and the plaintiff, by his inattention to this evasive plea of the defendants, undertakes to prove a negative — viz., that the sheriff had not returned, when it was the duty of the sheriff to prove that he had returned the execution. The defendants introduced, as a witness, the deputy clerk, who stated that he had not seen the execution in the office before the 20th May, 1840: being delivered to the sheriff on the 22d day of February, 1840, it should have been returned on the first Monday in March of that year. He stated, that, after the term of the Circuit Court to which this execution was returnable, Miller, the attorney of

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Sublette and Campbell, was at the office, and inquired for an execution, which he could not find; and supposing that he intended to sue the sheriff, the witness told the sheriff "He had better return his execution, as Miller was after him, and," as the witness supposed, "intended to sue him:" that, in a few days, the sheriff returned a parcel of executions, of which this was one; and that he (the witness) believing he might be called on to prove the time of returning it, endorsed on them the time at which they were brought in. The witness stated, that the officers of the court, and attorneys, had been too much in the habit of removing papers from the office: that he did not know whether said execution had been in the office before the time endorsed on it or not.

Mr. Bay, the attorney-general, contends, for the defendants, that the testimony was insufficient; that the plaintiff should have introduced the principal clerk, who alone could be presumed to know at what time the return of the execution was made. The return of an execution is not merely the bringing back into court the paper on which the authority of the sheriff to act is written, but it is necessary that he should make on that paper an endorsement in writing of what he has done, in obedience to the order therein contained. In 1 Chitty, 691, we find, that if the defendant plead that he requested the plaintiff to deliver an abstract of title, but that the plaintiff did not, when so requested, deliver such abstract, but neglected and refused so to do, the plaintiff cannot reply that he did not neglect and refuse to deliver such abstract; but should reply, either denying the request, or, affirmatively, that he did deliver the abstract. The plea was demurable.

It is not allowable that a defendant should, by such an evasive plea, throw on the plaintiff the burthen of proving what it was his own duty to prove, and what he could very easily have proved by his own endorsement on the execution, if it be true that he did return it, as by law required. No evidence was given of the return of the writ of execution. The sheriff's endorsement on it was the first evidence necessary to be given, in order to show what he had done under the execution; and the clerk's endorsement of the time of filing the same is the evidence of the time at which it was filed; and this endorsement of the writ by the sheriff, and filing it in the clerk's office, together constitutes, in law, a return.

The judgment of the Circuit Court is reversed, and the cause remanded.

SCOTT, Judge, did not sit in this case.

Overton et al. vs. Curd and Russell.

OVERTON ET AL. vs. CURD & RUSSELL.

1. Where a party promises to pay a certain sum "in consideration of their (the promisees) assuming debts of W. W." to the amount of said sum, the assumption of the debts is not a condition precedent to the payment of the money. The promise is absolute and unconditional.
2. Where no time is fixed for the performance of that which is the consideration of the promise, the promise will be considered unconditional.

APPEAL from Callaway Circuit Court.

TODD, for Appellants.

1. The general demurrer should have been sustained.
2. The action was misconceived, and should have been assumpsit.
3. Because the averments made do not show any cause of action.
4. The declaration contains no cause of action.
5. No judgment can be rendered on the declaration.
6. No action of debt will lie on the contract declared on.

LEONARD, for Appellees.

1. The leave to plead was not leave to demur specially, and, therefore, the special demurrer was properly rejected.
2. Admitting the defendants ought to have been allowed the benefit of their special causes of demurrer, yet the only excuse assigned, of which they could not have availed themselves upon the general demurrer, was the want of profert, and as the defendants afterwards craved, and had over and set out the instrument. This error, if error it were, was cured by these subsequent proceedings.
3. The instrument sued on is valid *propria vigore*, and needs no consideration to uphold the promise it contains.
4. The assumption of Woodson's debts is not a condition precedent to the plaintiffs' right to recovery.
5. Either debt or assumpsit was maintainable upon the instrument executed by the defendants.

TOMPKINS, Judge, delivered the opinion of the Court.

Isaac Curd and William Henry Russell brought their action of debt in the Circuit Court of Callaway county, against Reuben B. Overton and other persons; and recovered judgment against them, to reverse which, this writ of error is prosecuted.

This suit was brought, on an instrument of writing, in these words:—"Twelve months after date we promise to pay to Dr. Isaac Curd, and Colonel Wm. Henry

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Russell, the sum of two hundred and thirty dollars, in consideration of their assuming debts of Warren Woodson, of the said amount of two hundred and thirty dollars."

This declaration in debt is in the common form, and it is demurred to generally. In support of the demurrer, it is insisted that the assumption of the debts of Warren Woodson was a condition precedent to the payment of the money sued for, and should have been averred in the declaration, (which was not done) and that the names of the defendants being all subscribed on the left-hand side of the paper on which the note was written, and two black lines being drawn on the right-hand side of those names, betwixt which was written "proportion paid," it was thence obvious that it was intended by this writing that each defendant was bound to pay one-tenth part only of the whole sum of \$230. Therefore, the action should have been *assumpsit*. In *Pordage vs. Cole*, 1 Saunders, 320, note 1, it is said, that if a day be appointed for the payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the purchase money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent: and so it is where no time is fixed for the performance of that which is the consideration of the money or other act. The promise to pay this money, then, is absolute and unconditional, and there is no necessity for an averment, in this declaration, that the plaintiffs had assumed debts of Warren Woodson, to the amount of \$230, in order to entitle themselves to recover. If that averment had been necessary, it is not obvious to me that the action should therefore have been in form *assumpsit*, and the defendant having produced no authorities to sustain his point, I shall pass it over. We must ascertain from the face of the writing itself, that is, from the words, what is its meaning—not from the black lines drawn on the right hand of the names.

The judgment of the Circuit Court is affirmed.

BRIGHT ET AL. vs. WHITE.

1. Books offered in evidence as the "printed statute books" of a sister State, must purport "to be printed under the authority of such" state. (See Rev. Stat. 1835, title, "Evidence," sec. 2, p. 250.) Therefore, the book entitled, "The Statute Laws of the State of Tennessee, of a public and general nature, revised and digested by John Haywood and Robert L. Cobbs, by order of the General Assembly," and the book entitled, "A compilation of the statutes of Tennessee of a general and permanent nature, from the commencement of the Government to the present time, with references to Judicial Decisions in notes: to which is appended a new collection of Forms; by K. L. Caruthers and A. O. Nicholson, Nashville, Tennessee," are not admissible in evidence as the "statute books" of the State of Tennessee, neither "purporting to be printed under the authority" of that State.

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2. The county courts of the State of Tennessee are courts of general jurisdiction, and the record of the probate of a will from such a court is a record and judicial proceeding within the meaning of the constitution of the United States, and the act of Congress of 26th May, 1790, for the authentication of records, &c.
3. The certificate of a clerk of a court of record, that "the foregoing contains a true and perfect copy of the last will and testament of Joseph Dial, deceased, and the record of probate remains in my office," is defective: it should have stated, "and of the record of probate remaining in my office." It being not only necessary to set out a "true and perfect copy" of the will, but of the record of probate also.

APPEAL from Howard Circuit Court.

CLARK, TODD and KIRTLEY, for Appellants.

1. The book offered as Hayward & Cobb's Revisal and Digest of the Laws of Tennessee does purport to be printed under the authority of said State, as evidence of its legislative acts.
2. Caruthers and Nicholson's Compilation does purport to the same effect.
3. The judicial records and proceedings of the County Court of Warren county, Tennessee, are admissible as evidence in the courts of this State.
4. The proceedings offered in evidence are duly attested. — 1 Starkie, 196 *et seq.*; 3 Pickering, 293; Rev. Stat. of Mass., chap. 94, sec. 59; 1 Story's Dig., 93; 2 *Ibid.*, 947; 4 Mon., 153; 6 Litt., 388; 7 Mon., 586.

LEONARD, for Appellee.

1. Hayward & Cobb's Digest of the State of Tennessee was no evidence of the statute law of that State, and therefore properly rejected when offered for that purpose; Packard vs. Hill, 2 Wendell's Rep., 411; Lincoln vs. Battelle, 6 Wendell's Rep., 483; Rev. Stat., title "Evidence," sec. 2.
2. Caruthers & Nicholson's Compilation of the Statutes of Tennessee, either by itself, or accompanied by the statute of Tennessee, of 1831, authorizing the purchase and distribution of this compilation among the officers of the State, was no evidence of the statute law of Tennessee; and, therefore, properly rejected when offered for that purpose. — Same authorities cited above.
3. The alleged copy of the will and probate was no evidence of the will, without some proof of the law of Tennessee in relation to the making and custody of wills, and of the jurisdiction of the court over them.
4. Admitting that the books offered were legal evidence of the laws of Tennessee; or, if not, that the record itself was *prima facie* evidence of the jurisdiction of the court, yet the alleged record was properly rejected, because —
 - 1st. It was not properly certified under the laws of the United States, so as to enable it to be read as evidence of a judicial proceeding. — G. & C. Lendenberger vs. Rosseau, 2 Const. Rep. South Carolina; 1 Greenleaf's Ev., 550, 551; 3 Hill & Cowen's edit. of Phil. Ev., 1,130, 1,131, and cases there cited.
 - 2d. The clerk's certificate is defective, in not certifying that the alleged probate of the will is a true copy of the record of such probate.

Bright et al. vs. White.

TOMPKINS J., delivered the opinion of the Court.

Jacob Bright, and Hannah, his wife; Joseph Stapp, and Esther, his wife; John Stapp, and Nancy, his wife, and Margaret Wilson, sued John R. White in the Circuit Court of Howard county, and judgment being there given against them, they appeal to this court.

The action was brought to recover damages for the conversion of two negroes, slaves for life, charged to have been converted by White to his own use.

The plaintiffs claimed the slaves in controversy as female heirs of their mother, Elizabeth Wilson; who was the daughter of Joseph Dial, lately deceased, in Warren county, State of Tennessee; the said Joseph Dial having, on the 30th of April, 1827, made his last will, with a bequest to his daughter, Elizabeth Wilson, in these words:—"Elizabeth Wilson has received \$420 in a negro girl, named Rhody; and it is further my will that the said girl, Rhody, and her increase, be considered the property of the said Elizabeth during her natural life; and none of them to be disposed of by any person, in any way; and at or after her death, the said negro, Rhody, and her increase, to be equally divided among the heirs of the said Elizabeth's body."

Elizabeth Wilson, the mother of the female plaintiffs, died before the commencement of this suit; and the negroes here sued for are the descendants of the said slave, Rhody, mentioned in the will. A copy of this will was offered in evidence, to which the names of three persons are subscribed as witnesses, and these certificates were attached:—

"The execution of the last will and testament of Joseph Dial was this day proved in open court by the oath of John Fletcher, Thomas Stroud and William Ramsay, subscribing witnesses thereto, who made oath that the deceased was of sound mind and disposing memory; whereupon John Dial came into open court, executor of the last will and testament of said Joseph, deceased, who was qualified, and gave bond and security, as the law directs, as executor, as aforesaid; whereupon it was ordered by the court that letters testamentary issue, &c.

"STATE OF TENNESSEE, *Warren county.*

"I, William Armstrong, clerk of the County Court of Warren county, do certify that the foregoing pages contain a true and perfect copy of the last will and testament of Joseph Dial, deceased, and the record of probate remains in my office.

"Witness my hand, and seal of office, this 11th day of June, 1840.

"WILLIAM ARMSTRONG, *Clerk.*

"By JAMES ARMSTRONG, *D. C.*"

"STATE OF TENNESSEE, *Warren county.*

"I, Asa Faulkner, Chairman of said County Court, do certify that William Armstrong, whose name is annexed to the above certificate, is, and was at the time of signing the same, the clerk of said court, duly elected and qualified as such, and that his attestation is in due form of law.

"Witness my hand and seal, this 11th day of June, 1840:

"ASA FAULKNER, *Chairman.*"

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"STATE OF TENNESSEE, *Warren county.*

"I, William Armstrong, Clerk of the County Court of Warren county, do certify that Asa Faulkner, whose name appears to the foregoing certificate, is now, and was at the time of making the same, Chairman of the County Court of said county, duly elected, commissioned and qualified; and that due faith and credit is, and ought to be, given to his attestation as such; and that his said certificate is in due form of law.

"Given under my hand, and seal of office, at office, this 11th day of June, 1840.

"WILLIAM ARMSTRONG, *Clerk,*

"By JAMES ARMSTRONG, *D.C.*"

The plaintiffs then offered in evidence a printed book, with this title-page, viz. — "The Statute Laws of the State of Tennessee, of a public and general nature, revised and digested by John Haywood and Robert L. Cobbs, by order of the General Assembly." Vol. 1, Knoxville. T. F. S. Haskill, printer and publisher. 1831.

The court rejected the said copy of the will, attested as aforesaid, and the said law of Tennessee, on the subject of wills, as aforesaid, and would not permit them to be read in evidence: the plaintiffs excepted.

The plaintiffs then offered the same attested copy of the last will, aforesaid, and offered, as evidence of the law of Tennessee on the subject of last wills and testaments, a printed, bound book, with this title-page — "A Compilation of the Statutes of Tennessee, of a general and permanent nature, from the commencement of the government to the present time; with references to judicial decisions, in notes: to which is appended a new collection of forms. By K. L. Caruthers and A. O. Nicholson. Nashville, Tennessee: printed at the steam-press of James Smith: 1836."

And, as a further proof of the competency of the evidence of the said printed book, offered to read out of a printed, bound book, having this title-page: — "Acts passed at the First Session of the twenty-second General Assembly of the State of Tennessee, 1837-8. Published by authority. S. Nye & Co., Printers to the State: 1838." — To this book no objection being made, the plaintiffs read part of "An act to provide for the distribution of the laws of Tennessee;" by which it appears that the Secretary of State was directed to purchase a sufficient number of "Caruthers & Nicholson's Compilation:" one copy of which was given to the people in each district of the State, for their use, inspection and information, and transmitted to each magistrate of the district; and in each copy to be written — "Presented to the people of the district by the State of Tennessee."

The defendant then objected to reading the paper purporting to be the last will, aforesaid, and the probate thereof, and certificates; and to reading the said acts purporting to be the laws of Tennessee, comprised under the head "Wills," in said volume; or "Compilation of Laws," by Caruthers and Nicholson, aforesaid; which objection was sustained by the court, and the plaintiffs excepted.

The plaintiffs then took a non-suit, with leave to move the court to set the same aside; and afterwards, at the same term, moved to set the said non-suit aside, for

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this reason, that the court improperly rejected the evidence offered by them on the trial.

The plaintiffs, to reverse the judgment of the Circuit Court, insist —

1. That the book offered as “Haywood and Cobb’s Revisal and Digest of the Laws of Tennessee” does purport to be printed under the authority of the State, as evidence of its legislative acts.

2. That “Caruthers & Nicholson’s Compilation” does purport to the same effect.

3. That the judicial records and proceedings of the County Court of Warren county, Tennessee, are admissible as evidence in the courts of this State.

4. That the proceedings offered in evidence are duly attested.

The second section of the act concerning evidence (page 250 of the Digest of 1835) provides, that “The printed statute-books of sister States, and the several Territories of the United States, purporting to be printed under the authority of such States or Territories, shall be evidence of the legislative acts of such States or Territories.”

It is by the statutes alone that the printed statute-books of sister States are evidence of the legislative acts of such States; and without the aid of this statutory provision, we should be compelled to prove the statute laws of other States by an exemplification, and not by printed books, of such States. A book purchased out of a book-store, purporting to contain the laws of a State, unless published by authority, would not be admitted anywhere as evidence of the written laws of any government.—Packard et al. vs. Hill, 2 Wendell, p. 413.

The title of the first printed book offered in evidence to prove the laws of Tennessee, is, as above-mentioned, “The Statute Laws of the State of Tennessee, of a public and general nature, revised and digested by John Haywood and Robert L. Cobbs, by order of the General Assembly. T.F.S.Heiskill, printer and publisher.”

To make such books evidence of the legislative acts of the several States, it is essential that they should *purport to be printed under the authority of such State*. When such a book is printed under the authority of a sister State, such State is presumed to cause the printing thereof to be superintended by a competent and trustworthy agent, who will see that the legislative acts are correctly printed. It is true, we are informed by this title-page that these laws of the State of Tennessee were revised and digested by order of the General Assembly, and we may, therefore, admit that they were revised and digested under the authority of the State; but it is evident, however correct the work might have been when it passed out of the hands of the persons who revised and digested it, *by order of the General Assembly*, that it might have been badly and even unfaithfully printed. To provide against the corruption or misrepresentation of the legislative acts of sister States offered in evidence in our courts, the above-recited act of the Digest of 1835 required that they shall purport to be printed under the authority of the State.

It is not pretended that even this book was printed under the authority of the State of Tennessee. It is not, then, such a book as is, under our statute, admitted to be read as evidence of the legislative acts of the State of Tennessee.

The second book offered in evidence by the plaintiffs is, the “Compilation of Caruthers & Nicholson, Nashville, Tennessee: printed at the steam-press of James

Smith." This book does not purport to be either compiled or printed under the authority of the State of Tennessee. Its pretensions, then, are much lower than the Digest of Haywood and Cobbs, that purports to be digested, but not printed, by authority of the State. But it is contended, that the State of Tennessee manifested its confidence in the accuracy of this compilation of Caruthers & Nicholson, by purchasing a number of copies to be distributed throughout the State. Let it be conceded; yet this Compilation is not authenticated as our act requires. It is on the aid of the act of our legislature alone that the plaintiffs rely to have the Tennessee laws read in evidence; and if they do not comply with its requisition, they cannot give the laws of Tennessee in evidence, however accurately they may be printed.

Neither the Digest of Haywood & Cobbs, nor the Compilation of Caruthers & Nicholson, were admissible in evidence to prove the laws of Tennessee.

The third and fourth points made by the plaintiffs may more properly be considered under one head, and their meaning may be expressed in these words — "That the judicial records and proceedings of the County Court of Warren county, in the State of Tennessee, offered in evidence, are properly attested, and are admissible in evidence in the courts of this State."

It is assumed, that the record of the probate of this will is a record and judicial proceeding of a State within the meaning of the act of Congress of 26th of May, 1790; and it is contended, that it is so attested, that, under that act, it ought to have been received in evidence in the Circuit Court. In *Robertson vs. Barbour* (6th Monroe's Ky. Rep.), the record of the probate of a will is considered a judicial proceeding in the sense of the act of Congress of 26th of May, 1790.

In *Greenleaf's Evidence*, p. 549, it is said, that it is provided in the Constitution of the United States, that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and that the Congress may, by general law, prescribe in what manner such acts, records and proceedings may be proved, and the effect thereof. Under this provision it has been enacted, that the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court in the United States, by the attestation of the clerk, and the seal of the court annexed — if there be a seal — together with the certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the attestation is in due form; and the said records and proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law, or usage, in the courts of the State wherever the records are or shall be taken. — Statutes of the United States, May 26, 1790.

The judicial proceedings referred to in these acts are also generally understood to be the proceedings of courts of general jurisdiction, and not those merely which are of municipal authority; for it is required that the copy of the record shall be certified by the clerk of the court; and there shall, also, be a certificate of the judge, chief justice, or presiding magistrate, that the attestation of the clerk is in due form. This, it is said, is founded on the supposition, that the court whose proceedings are so to be authenticated is so constituted as to admit of such officers.

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The County Court of Warren county appears, from the transcript of its proceedings spread on this record, to have had a clerk and seal, a chairman, or president, (see *Johnson's Dictionary*,) and it was a court of general jurisdiction; for it may reasonably be supposed that each county had its county court and chairman. It certainly would have been better if the chairman of that court could have called himself presiding judge of the county court, as the act of Congress requires; and there seems to be little doubt but he might properly have done it.

This court, then, is a court of record, within the meaning of the act of Congress of 26th of May, 1790.

The clerk has certified that the foregoing pages contain a true and perfect copy of the last will and testament of Joseph Dial, deceased, and the record of probate remains in his office. The attestation is thus:—

“Witness my hand and seal, this 11th day of June, 1840.

“WILLIAM ARMSTRONG, *Clerk.*

“By JAMES ARMSTRONG, *D. C.*”

And Asa Faulkner, the chairman of the County Court, then certifies, in a manner formal enough, that William Armstrong was clerk, &c., but says nothing in his certificate about the deputy clerk.

The court will not, as now advised, say that the judge should have certified that James Armstrong was deputy clerk. No authorities have been furnished on either side. There is a radical defect in the certificate of the clerk, on account of which this judgment must be affirmed; and if the action should be again brought, the plaintiffs can consider whether they can safely trust to such a certificate. The clerk's certificate, that Asa Faulkner was the chairman of the County Court, was altogether superfluous.

The defect in the clerk's certificate, above-mentioned as radical, is this, viz.: The clerk, after stating that “The foregoing paper contains a true and perfect copy of the last will and testament of Joseph Dial, deceased,” adds these words: “And the record of probate remains in my office.” It was very material that he should certify that the copy of the will was *true and perfect*; it was also very necessary that he should have given us a true and perfect copy of the record of probate, and that he should have also certified it to be a true and perfect copy of such record and probate; but instead of doing this, he certifies that the foregoing pages contain a “true and perfect copy of the last will and testament of Joseph Dial, deceased, and [that] the record of probate remains,” &c. The counsel for the plaintiffs proposed to cure this blunder by interlining the word *of* betwixt the words “and” and “the record,” and by changing the word “remains” into *remaining*. By this mode of interlining words—that is, of adding them and of altering them where the meaning is already clear—any writing may be so changed, as to mean the very opposite of what it did when it came from the hand of the maker. This certificate, then, is radically defective; that, however formal it may otherwise be, this defect cannot be cured.

The Digest, then, of Haywood and Cobbs was properly rejected, when offered in evidence: so was the Compilation of Caruthers and Nicholson. Neither of

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these books were, however, if admissible, absolutely necessary, as the record of probate of wills is a judicial proceeding under the act of Congress.

The certificate of the clerk being radically defective, in not stating that the paper contained a true and perfect copy of the last will and testament of Dial, and of the record of probate remaining in his office, the judgment of the Circuit Court must be affirmed.

JACOB BRIGHT ET AL. vs. A. C. WOODS.

APPEAL from Howard Circuit Court.

TOMPKINS, J., delivered the opinion of the Court.

This case is of the same character as that of *Bright et al. vs. White*, and the same judgment will be entered.

CHANDLER vs. GARR.

In an action of debt on a judgment recovered in the "County Court" of Louisa county, in the State of Virginia, the plaintiff offered in evidence the record of a judgment rendered at a "court of quarterly session" for said county: *Held*,

That there was no variance, it appearing from the record that the court of "quarterly session" was the "County Court." The judgment being recorded by the County Court at its quarterly session.

ERROR to Cooper Circuit Court.

MILLER and STEWART, for Plaintiff in Error.

The plaintiff in error will insist that the court below erred in admitting the record offered in evidence for the variance between the declaration and the record. The plaintiff declares upon a judgment of the "County Court of Louisa county," and from the record it appears the judgment was rendered by a court of "Quarterly Sessions" of said county; and as the record is vouched in evidence, a slight variance is material, but here is a variance in the name of the court by which

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judgment was rendered.—See *Martin vs. Miller*, 3 Mo. Rep., 100; *Bell & Craig vs. Scott*, 3 Mo. Rep., 212; *Hibler vs. Leross*, 6 *Ibid.*, 24; *Coleman vs. Edwards*, 4 Bibb, 347.

HAYDEN, for Defendant.

TOMPKINS, J., delivered the opinion of the Court.

This is an action of debt by Aaron Garr, the appellee, against Leroy Chandler, the appellant. In the Cooper Circuit Court, Garr declared on a judgment recovered in the County Court of Louisa county in Virginia, in the year 1823, for the sum of \$234 and $\frac{25}{100}$, together with costs, &c.

The declaration contained two counts each, upon a judgment of the County Court of Louisa county, Virginia. The defendant filed the plea of *nul tul record*, and the cause being at issue, was submitted to the court for trial. Upon this trial plaintiff offered in evidence a certified copy of a record of a judgment in favor of the plaintiff against the defendant, by which it appeared, that at a court of *Quarterly Sessions* held for the said county of Louisa, Virginia, judgment was rendered for the defendant for the above-mentioned sum of \$234 $\frac{25}{100}$. The defendant objected to the introduction of this record in evidence; the court overruled the objection, the record was received in evidence, and the defendant excepted to the opinion of the court overruling his objection. The court found for the plaintiff on this evidence, and entered up judgment on that finding. The defendant moved for a new trial, because the court admitted the evidence offered by the plaintiff. The motion for a new trial was overruled, and the defendant excepted to the opinion of the court.

The defendant insists, that there is a variance betwixt the judgment as declared on, viz., a judgment of the County Court of Louisa county, and the record offered in evidence, from which it appears that the judgment was rendered by a court of *quarterly sessions of the said county of Louisa*.

The defendant relies on *Miller vs. Martin*, 3 Mo. Rep., 100; *Bell and Craig vs. Scott*, 3 Mo. Reports, 212; *Hibler vs. Leross*, *Ibid.*, 24; *Coleman vs. Edwards*, 4 Bibb, 347.

Without examining the authorities of the defendant, it may be admitted without hesitation, that where a record is declared on, as in this case, it is the very foundation of the action, and it must be strictly set out in the declaration.

The statement of case above given is almost literally that of the counsel of the defendant. The record itself will now be examined more particularly than it has been by him, in order to ascertain whether there is any variance betwixt the record, as it is set out in the declaration, and that offered in evidence.

The record offered in evidence commences thus: "Pleas at the court-house of Louisa county before the worshipful justices of said county, on Wednesday," &c. Afterwards, it is said that, "At rules held in the clerk's office of the County Court of Louisa county, on the first Monday in July, in the year aforesaid (1823) came Aaron Garr, by Porter, his attorney, and filed his certain bill against Leroy Chandler," &c.

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The declaration is then set out, and this order is made: "Whereupon, the defendant being arrested, and not appearing on the motion of the plaintiff by his attorney, it was ordered, that judgment be entered up for the plaintiff against the defendant for the debt in the declaration mentioned, and costs, unless the defendant should appear and plead at the then rules."

"At which day, to wit, at rules held in the clerk's office of said County Court on, &c, the defendant still failing to appear, and plead to issue, on motion of the plaintiff by his attorney, it was ordered, that the last order made against the defendant be confirmed, and afterwards, to wit, at a court of quarterly sessions held for the said county at the court-house, &c., Charles Thompson comes into court and undertakes for the defendant, &c. And afterwards, to wit, at a court of quarterly sessions held for the said county at the court-house thereof, &c., came as well the plaintiff, by his attorney, as the defendant, &c.; the defendant then pleads payment, the plaintiff replies, negativing the payment, and the judgment obtained against the defendant at the rules in the clerk's office is set aside."

The record then proceeds, "And now at this day, to wit, &c., at a court continued and held for the said county of Louisa, at the court-house, on the same day, &c.," the defendant abandons his plea of payment, and remaining altogether undefended, the entry is, "Therefore it is considered by the court, that the plaintiff recover, against the defendant, the debt in the declaration mentioned, &c."

Thus we have seen that, in this case, the record of which was offered in evidence and objected to by the defendant, the pleas were held, "at the court-house of Louisa county, before the worshipful justices of said county," and that, "at the rules held in the clerk's office of the County Court of Louisa county," Aaron Garr, by his attorney, filed his bill against Leroy Chandler, and that afterwards, "at rules held in the said clerk's office of said County Court, the defendant still failing to appear and plead to issue, the judgment before obtained against the defendant was confirmed; that afterwards, at a court of quarterly sessions held for the said county of Louisa, Charles Thompson comes into court and undertakes for the defendant, that in case he shall be cast in this suit, &c.; that at a court of quarterly sessions the parties plead, and that, at a court continued and held for the said county of Louisa, the judgment is rendered for Garr against Chandler.

In all this I see nothing to repel the belief that this Court of Quarterly Sessions was the County Court. The rules (evidently for this Court of Quarterly Sessions) were "held in the clerk's office of the County Court of Louisa county;" that is to say, "in the office of the clerk of the County Court of Louisa county." It is not to be supposed that the pleadings in the causes would be made up before any one but an officer of the court before which those causes were to be tried. It was objected, that this judgment appeared on the record to have been rendered by a "Court of Quarterly Sessions," whereas the declaration states it to have been rendered by the County Court. From the general language of the record, I can entertain no doubt but the judgment was rendered by the County Court at its quarterly sessions.

But if there were room for a doubt on this subject, that doubt is settled by another part of the record, to wit, the execution. By that writ the sheriff is com.

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manded to make the sum of \$235 25 cents, which Aaron Garr lately recovered, "in our County Court of Louisa county," &c. It appears evidently to be the same court called by different names, viz., "County Court," and "Court of Quarterly Sessions."

The record then, as it seems to me, is rightly described in the declaration, and the judgment of the Circuit Court of Cooper county must be affirmed.

TODD ET AL. vs. BOONE COUNTY.

Boone county brought suit against the treasurer of that county and his securities in his official bond, for a default. On the trial, the county offered to introduce as a witness another security of the treasurer in a former bond, who being interrogated on his *voir dire*, stated that he had no interest in the event of the suit, but believed that a recovery against the defendants would prevent a suit against him: *Held*,

1. That his interest was of that remote and contingent character which affected only his credibility, and did not render him incompetent. The record in this suit could not be evidence for or against the witness in another action.
2. Where questions of fact have been submitted to a jury, and there is any contrariety in the testimony, the verdict will not be disturbed; but where the measure of damages is fixed by law, and the verdict is obviously the result of a mistaken view of the rule of law applicable to the facts in evidence, it will be set aside.

ERROR to Boone Circuit Court.

LEONARD and TODD, for Plaintiffs in Error.

1. Moss Prewitt was an interested witness, and ought to have been excluded.—
- 2 Porter's Alabama Reports.
2. It devolved upon the plaintiff below to show an official default on the part of Cornelius, occurring during the official term covered by the bond now in suit, and the present bond being executed by the sureties on the 28th December, 1840, they are liable only for defaults occurring subsequent to that day.—United States vs. Eckford's Representatives, 1 Howard's U. S. Reps., 250.
3. In the imputation of indefinite payments, made by officers holding the same office by successive appointments, and who have given security for the discharge of their official duties, the rule is, that money received during an official term shall be applied to the payment of the indebtedness created by the receipt of such money; and, in the absence of proof to the contrary, the presumption of law is, that the money paid during any one official term was received during the same term.—United States vs. Patterson & January, 7 Cranch Rep., 572; Seymour vs. Van-

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stick, 8 Wend. Rep., 403; *Stone vs. Seymour & Bouck*, 15 Wend. Rep., 19; *United States vs. Eckford's Representatives*, 1 Howard's U.S. Rep.; *Marryatts vs. White*, 2 Starkie's Rep., 101.

4. In the present case, the law has prescribed a certain measure of damages, and if the jury in their verdict have exceeded that measure, the Court will set it aside.—*Stone vs. Seymour & Bouck*, 15 Wend. Rep., 19.

GORDON, HAYDEN and KIRTLEY, for Defendants in Error.

1. Moss Prewitt was a competent witness, having no interest in the event of the suit, and the objection to him, if any, went to his credit, and not to his admissibility.—1 Phillips' Ev., 47-53; 1 Starkie, 102-5.

2. William Cornelius being, at the time of his first resignation, immediately re-appointed, was, upon the execution of his last bond, immediately chargeable with the funds and effects of the office, there being no necessity for a formal settlement, under his last appointment, with himself, for the balances against him under his former one.

3. By his quarterly reports, from which the accounts preserved in the bill of exceptions were made up by the clerk, under Cornelius' last appointment, he admitted the several balances in his hands due for county revenue, for the three per cent. road and canal funds, and for the several township school funds; and this, with the testimony of Woodson and the facts exhibited in the accounts themselves, well warranted the verdict rendered by the jury in this cause.

4. The jury being the judge of the facts, and having evidence from which they were warranted in finding the verdict rendered, the Circuit Court committed no error in refusing to disturb that verdict.—*U. States vs. Kirkpatrick*, 9 Wheaton, 720; *United States vs. January & Porter*, 7 Cranch, 572; *Seymour vs. Vanstick*, 8 Wend., 403; 5 Mason, 87; *Gert vs. Higgard*, 1 Bibb. 91; 3 Littell, 169.

NAPTON, Judge, delivered the opinion of the Court.

This was an action instituted upon the official bond of William Cornelius, as treasurer of Boone county, with R. N. Todd, David Lammer and Samuel Murrell as securities.

The facts, as preserved by the bill of exceptions, are as follows:—

On the 2d December, 1840, William Cornelius resigned his office as treasurer of Boone county, (having held the same from January, 1836, up to that date,) and on the same day, he was re-appointed and entered into bond. On the 28th of the same month, this bond, with Todd, Lammer and Murrell as securities, was approved by the County Court. On the first of December, 1841, he resigned, and Moss Prewitt was appointed his successor. Upon his final settlement with the County Court, he was found chargeable with the following sums:—

"County Revenue	\$735 33½
Road and canal fund	757 63½
Township school fund	2,875 22½."

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In January, 1842, Cornelius paid over to his successor a warrant on the road and canal fund, amounting to \$709, which reduced his default on account of that fund to \$48 63. During the same month, he was credited with \$236 40, upon a warrant drawn on the township school fund, and with \$520 paid in the same month, on a warrant drawn on the same fund, leaving a balance against him, on account of said township school fund, of \$2,118 82.

Previous to the 2d of December, 1840, no regulations had been made by the County Court of Boone county, prescribing when annual settlements should be made by the treasurer. The treasurer made reports at each term of said court, of his receipts and disbursements of county revenue, and from these reports settlements were made out under direction of the court.

It appeared by a settlement made on the 26th November, 1840, upon the treasurer's report, that there was at that date a balance in the treasury of \$1,494 06.

By a previous settlement, made on the 24th August, 1840, a balance appeared in the treasury of \$4,159 25.

Prior to December, 1839, no general account relative to the school fund was kept with the treasurer, and it appeared from the testimony of the clerk of the court, that up to that time their mode of managing that fund was as follows: An order was made to loan any sum due a particular township; the notes presented by the borrowers were examined, and if approved, the borrowers took the notes to the treasurer, who, upon presentation, paid the money, and filed the notes with the clerk.

After the 2d December, 1840, a regular account was opened with the treasurer, a transcript of which was in evidence. From this it appeared, that from the 2d December, 1840, to the 28th of the same month, the treasurer had received of the county revenue the sum of \$147 56, and during the same period, the sum of \$415 15 of township school funds.

Between the 30th December, 1839, and the 2d December, 1840, the settlements of the treasurer showed that there had come to his hands during this period, of school funds, the sum of \$11,230 84; that he had disbursed thereof, during the same period, the sum of \$9,726 84, leaving a balance on hand at the 2d December, 1840, of \$1,493 50.

From the 28th December, 1840, to the 7th December, 1841, the treasurer had received of the township school fund the sum of \$4,183 75, and had disbursed from the same fund the sum of \$3,451 44, leaving a balance chargeable to him of \$732 31.

During the same period (from the 28th December, 1840, to the 7th December, 1841,) the treasurer received of the county revenue the sum of \$2,095 58½, and disbursed on that fund the sum of \$3,002 18.

It appeared from the testimony of several witnesses, that prior to the 2d December, 1840, and from the time of the treasurer's appointment in 1836, the defendant was a merchant in the town of Columbia; that he never kept any separate or distinct treasury; that the public funds were kept promiscuously with his private funds, and that many of his accounts relative to the treasury were kept in his mercantile books. Testimony was given, conducing to show, that the defendant,

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about the 2d December, 1840, and previous thereto, had no money on hand, either of his own or the public, that his private debts were pressing, and that the public money had been squandered or applied to his private uses.

It appeared from the testimony of John Martin, who was sheriff of Boone county during the years of 1840 and 1841, that the witness, on the 3d August, 1840, settled with defendant for the revenue of the year 1839, which amounted to \$3,250 84. That settlement was made in this wise: the witness having previously paid some money to defendant, he executed to him two promissory notes, one for \$1,000, the other for \$1,003 31, being the amount of revenue unpaid. These notes were afterwards settled with defendant at different times, and in various ways. Cash was paid to defendant during the months of September and November following, and on the 10th of December following, witness got a credit for \$600 on said notes, by giving his note for that amount with security. Portions of the money he paid, by taking up individual notes of defendant. Witness was in the habit of depositing his money as sheriff and collector with defendant, and drew on defendant, who kept an account of receipts and disbursements with him. Witness had two settlements with defendant, before the two notes above referred to were liquidated: one in January, 1841, the other in August, 1841. As part payment of the money remaining due on the two notes, the witness executed his note with security, payable to one Field, which note defendant gave to said Field, in liquidation of a private debt due by him to said Field.

Objections were taken on the trial, to the introduction of Moss Prewitt as a witness, on the ground of interest. On his *voir dire*, this witness testified, that he was one of the securities of Cornelius on his first bond, and was his successor in the office of treasurer; that he, with others, had aided in employing counsel to prosecute the present suit, believing that a recovery in this action would prevent a suit against him; but he did not consider himself interested in the event of the suit. These objections to the witness were overruled, and he was permitted to testify.

No instructions were asked or given, and the jury found a verdict for the plaintiff, for \$3,173 00. A motion was made to set aside the verdict and grant a new trial, but the motion was overruled, and judgment rendered on the verdict.

Only two questions are presented by the record; the first being as to the competency of the witness Prewitt, and the record as to the propriety of setting aside the verdict.

In relation to the admissibility of the witness, it is conceded, that if he was competent, his belief on that subject, either that he was or was not interested, will not affect the question. The general rules relating to the nature and degree of interest which will disqualify a witness are well enough established, but the application of these rules to particular cases is sometimes embarrassing, and has occasioned a considerable diversity and conflict of opinion.

A witness who stands in the same situation as the party for whom he is called to give evidence, is not, on that account, disqualified. Thus, if there are two actions brought against two persons for the same assault, in an action against one, the other may be a witness. (1 Phillips' Ev., p. —) This principle was, in the case of *Blackett vs. Weir*, (5 Barn. & Cress., 385,) extended to actions founded on

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contract; and the court allowed a witness, who, on his *voir dire*, admitted his joint liability, to prove that the defendant was a partner.

In the case of *Dixon vs. Hood*, (7 Mo. Rep.,) this court did not adopt the doctrine of *Blackett vs. Weir*, but upon the authority of *Brown vs. Brown* (4 Tam., 752,) and *Marquand vs. Webb*, (16 Johns. Rep., 89,) held, that in such a case the witness was not competent to prove the defendant liable, and thereby directly diminish his own liability.

This class of cases we think clearly distinguishable from the present. The witness in this case, was security on the first bond, and the defendants were securities on the second bond, and a default had occurred, by which the plaintiff was entitled to recover the amount of the default, either from the defendants or from the witness. Suppose the witness by his testimony fixes the default on the defendants, and a recovery is had for the sum claimed; will that prevent the plaintiff from recovering the same amount from the witness and his co-securities? In other words, could the witness, in a suit upon the first bond, give in evidence the record of the judgment against the present defendants.

It is true that the probability of such recovery would be greatly diminished by a recovery in the present suit, since the conduct of the plaintiff would furnish strong grounds for believing her claim unfounded; but it cannot be pretended that the record would furnish any legal bar. The question in the suit against witness would be, whether witness was liable, and not whether the plaintiff had previously recovered the same sum from another.

The interest of the witness was, therefore, of that remote and contingent character which affects only his credibility, and does not render him incompetent.

The remaining ground upon which a reversal of this judgment is claimed is, that the verdict of the jury is wrong;—not supported by the evidence, and contrary to law.

By the act of February 14th, 1835, the treasurer is appointed by the county court, and holds his office during the pleasure of the court. It is made his duty to keep a just account of all monies received and disbursed, and regular abstracts of all warrants drawn on the treasury and paid. By the 7th section of this act the treasurer is required to settle his accounts once in every year, and if he resigns, be removed from office, or die, he, or his executors or administrators, is required immediately to make settlement, and deliver over to his successor all monies in the treasury, and all books and papers appertaining to his office. By the same act the treasurer is required to give bond, with security to be approved by the court, for the faithful performance of the duties of his office.

Cornelius resigned his office on the 2d day of December, 1840, but no settlement was made by him with the County Court at that time, as the law required; but he was on the same day re-appointed, and gave a new bond with securities. There is ground for believing from the testimony, that this bond was not executed by the securities until the 28th of the same month, when the bond was finally approved by the County Court. If this were so, (and whether it was so or not, was a question for the jury,) his securities are only responsible for his official acts subsequently to the time when they became parties to the instrument.

It appears that a settlement had been made with the defendant, Cornelius, on the 26th November, 1840, seven days previous to the commencement of the second term, and that upon this settlement there was a balance of \$1,494 06 remaining in the treasury. This sum was carried over into the current account of the ensuing quarter, and the final balance on that fund, appearing against the treasurer, on the 1st December, 1841, when his second term expired, was \$735 33½. The defendants were only responsible for the safe keeping of the monies received by Cornelius from the 2d or 28th December, 1840, (when they entered into bond) until the 1st December, 1841, and the balance of \$1,494 06, which appeared charged against the treasurer at the commencement of the term for which they were liable, is only *prima facie* evidence that this sum was actually in the treasury. If this sum never came to the hands of the treasurer after the responsibility of the present defendants accrued, or had been squandered by Cornelius prior to that date, it is clear that they cannot be held accountable for this default. Testimony was given on the trial conducing to establish this fact; tending to show, that in truth the sum appearing from the settlement with the County Court to be in the treasury was not there, but had been misapplied and appropriated to the private uses of the treasurer, before the 2d December, 1840. This was a question for the jury, and we shall not undertake to determine how much consideration it was entitled to in forming their verdict.

But it appeared from the abstract offered in evidence, that from the 28th December, 1840, to the 7th December, 1841, there had been received by the treasurer of county revenue the sum of \$2,095 58½, and that during that period he had disbursed the sum of \$3,002 18, thereby showing an excess of disbursements over receipts of \$758 74. Allowing the present defendants to have been chargeable with the sum of \$147 56, received between the 1st and 28th of December, 1840, there would still be a balance in their favor upon that fund of \$611 18. It would seem apparent from this calculation, that the sum of \$735 33½, which was evidently charged in the verdict against the present defendants, must have been a default occurring prior to the date of their bond, and for which they were not responsible.

In relation to the school fund, it seems that from the 28th December, 1840, to the 7th December, 1841, the treasurer had received of this fund the sum of \$4,183 75, and had disbursed the sum of \$3,451 44, leaving a balance properly chargeable to the present defendants of \$732 31. If to this be added the sum of \$415 15, received between the 2d and the 28th December, the whole amount chargeable to the defendants on account of this fund would be \$1,147 46. This is on the supposition that the balance of \$1,493 50, which, from the clerk's transcript, appeared charged against the treasurer on the 2d December, 1840, was not in fact in the treasury after the liability of the defendants commenced.

The balance due on the road and canal fund was only \$48 63, which, added to the deficit on the school fund, would show a default of \$1,196 09 during the year 1841. The verdict of the jury was for \$3,173, being evidently for the balance due at the expiration of Cornelius' second term, as it stood in the running account of the clerk of the County Court, and embracing the defaults of both terms, with interest up to the time of rendering the verdict.

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Where questions of fact have been submitted to a jury, and there is any contrariety in the testimony, this Court has repeatedly avowed its determination to leave the verdict of the jury undisturbed.

In this case, however, the measure of damages is fixed by law, and the verdict is obviously the result of a mistaken view of the rule of law applicable to the facts in evidence before them. It must have resulted from a conviction that the clerk of the County Court, by his mode of keeping the account between the treasurer and the county, could affect the liability of the defendants on their bond. The responsibility of the defendants arises from their bond; this responsibility cannot be created or changed by any acts of the County Court, or its officer, the clerk.

If the court or its officer neglected to settle with Cornelius upon his resignation of the office of treasurer in December, 1840, as by law they were required to do, and by this means it has become difficult to ascertain the precise amount of defalcations happening during the period of either term—the neglect must not prejudice the rights of the defendants.

The judgment will be reversed, and the cause remanded.

CRASLIN ET AL. vs. BAKER.

A. died in 1831, leaving a widow and nine children. At the time of his death he owed debts to about the amount of \$70, and the property left by him did not exceed that sum in value. The widow took possession of the property, paid the debts of deceased, and consumed most of the property in maintaining herself and children. In 1838 the widow intermarried with one B. Shortly after the intermarriage one of the sons of deceased took out letters of administration on his father's estate, went to the house of B., in company with the other defendants, and forcibly took possession of the property in controversy as the increase of the stock left by A. B. sued the defendants in trespass, and recovered the value of the property taken. Under the peculiar circumstances of the case the court permitted the verdict to stand, although as a general rule of law no person can acquire a right to the personal property of an intestate without administering on the estate, and conforming to the provisions of the statute in such cases.

APPEAL from Howard Circuit Court.

HAYDEN, for Appellants.

1. The property taken and sold by defendants, if the property of the estate of the deceased, Hanks, was properly sold as against the plaintiff, and whether the same were of the estate of the deceased, Hanks, was a question for the decision of the jury.

2. The court erred in not giving the instructions prayed for by defendants.

3. The court erred in giving the opinion which it gave to the jury upon their return into court, after having retired from the bar to consider of their verdict.

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4. The court erred in not setting aside the verdict, and in refusing a new trial to the defendants.—See Statutes, Digest, 1825, vol. 1, p. 102, sec. 30; Dig. 1835, p. 148, sec. 27-30.

TODD and LEONARD, for Appellee.

1. The first, third, and fifth instructions of defendants were properly refused, for a person even having legal right to property is not justified in taking possession of property, to commit a trespass, with force.

2. The second and fourth instructions were properly refused, because they contain an abstract proposition, and too general in terms, and the title of the defendants not involved, and because time and possession will give right to personal property without administration, where possession is under color of legal title.—3 Bacon Ab., 21, note.

3. The weight of evidence was for the plaintiff, and the verdict was for the right party.

4. The plaintiff's instructions were right.

5. The defendants did not *except*, although objecting to a previously expressed verbal opinion of the court.

6. The statute of 1824 gave the widow a right to \$150 worth of property; she retained under that right, and is entitled to the increase.

7. The administration was taken under color to deprive the plaintiff of his property, and should not justify a trespass, in taking and selling estate secured to the widow by law, the administration having power only to appraise the original stock, and take the widow's receipt for it.—Mo. Dig., 1824, 5; Toller, 228, and note; 3 Bacon, 21, and note; 6 Litt., 81.

TOMPKINS, J., delivered the opinion of the Court.

This is an action of trespass, commenced by Morris Baker against James Craslin, David Hanks, William Hanks, and others, in the Circuit Court of Saline county. From this court the suit was transferred to Howard Circuit Court; there a judgment was obtained against the defendants, from which they appealed to this Court.

In the year 1838, Baker, the appellee, married the widow of one Zachariah Hanks, who had died in November, 1831, in Saline county, leaving nine children, who lived with their mother, and were raised by her, until she intermarried with the plaintiff. The eldest was nineteen years old at the death of his father. When the deceased, Hanks, was on his death-bed, he told one of the witnesses of the defendant, that he owed about seventy dollars, and that he was leaving his family destitute, as his property would not pay his debts and support them. This witness says, that the property left by Hanks, at his death, was not worth the seventy dollars; "that he knows the old lady, by selling pork that winter, and with her boys' work afterwards, paid a debt of the old man's of \$32 or \$33 to Craslin."

Another witness of the defendants proved, that one of the minor children, with the consent of his mother, hired himself to this witness for a year; that he, the

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witness, paid this minor, some in clothing, some in bacon, and also assumed and paid to one Compton a debt of thirty dollars left by the old man, Hanks, at the time of his death.

It was also proved, that the widow paid the funeral expenses of her deceased husband, and that she paid to one of the witnesses four dollars, which the deceased, in his life time, owed to the witness. On the 20th day of July, in the year 1839, David Hanks, one of the sons of the deceased, took out letters of administration on the estate of his deceased father. This was done nearly eight years after the death of the father. One of the sons of the deceased, Jesse Hanks, called by the defendants, states, that when his father died, in 1831, he left nine children; himself the eldest; that his father had, at the time of his death, two cows and calves, one or two yearlings, and betwixt fifteen and thirty head of hogs.

After David Hanks, as aforesaid, had taken out letters of administration, he and the other defendants went to the house of the plaintiff, Baker, and forcibly took and carried away some cattle found there; and the last-mentioned witness states, that all the stock taken and sold by David Hanks, his brother, "was the natural increase of the stock on hand at the time of the death of his father, with some trifling exceptions of a stray cow left on hand at the death of his father, one yoke of oxen, which he had gotten in exchange for a stray left by his father.

There was some contradictory testimony as to the origin of the stock. Some of the testimony went to prove that a part of the cattle, &c., taken away by the administrator, was the increase of cows purchased by the widow. But it is not material to the present purpose whether it were or not.

A witness called by the plaintiff represents the quantity of hogs left by the deceased as somewhat less than the son of the deceased above-mentioned, called by the defendants, stated it to be; and further said, that the family, the winter of the death of its head, used such of the hogs as were fit for pork, and made beef of one cow; and that, at the time of the sale of the property by David Hanks, under the letters of administration, there were about sixteen head of cattle, including one yoke of oxen, and about one hundred head of the hogs; some of the children appear to have been supplied with cattle when they left their mother. The plaintiff had been married, and in possession of the stock more than a year before it was taken by the administrator, David Hanks.

On this evidence, the defendants moved the court to instruct the jury—

1. That in case they find the property sued for was taken and sold as the property of Hanks, deceased, by an administrator, and that the property taken and sold was the natural increase of the stock on hand at the time of his death, that then the administrator had a legal right to the property, and was not a trespasser by taking the property and selling it.

2. That by the law, no person can acquire a right to the effects of a deceased person who dies intestate, except by administration, except as excepted by the statutes of this State in favor of families.

3. That if, in this case, the jury believe, from the evidence, that if the wife of the plaintiff had taken into her possession property of her former husband without any grant of administration, and that that property, and its natural increase, is the

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property now sued for, and that the trespass complained of was the taking of the same by a lawful administrator as the property of the deceased, and selling the same as such, that in such case, the defendant, David Hanks, the administrator, was not guilty of a trespass, and in this action the jury ought to find for the defendants.

4. That if Mrs. Baker took the personal property of her deceased husband into her possession after his death, and he died intestate, she, by such act, acquired no right in such property as against a lawful administrator of her deceased husband, Hanks, and that the natural increase of said cows and hogs also belongs, in law, to the administrator, to be administered according to law.

5. That if Mrs. Baker is found by the jury, from the evidence, to have been the wife of Hanks, at the time of his death, and he died intestate, and she took the cattle and hogs of her deceased husband into her possession, and used them as her own, that in such case she has acquired no legal right either to the cattle or hogs, or to their natural increase, so taken into her possession, as against a lawful administrator of the deceased; and that the plaintiff, Baker, by his intermarriage with her, acquires no more right to the cattle and hogs than the wife had before such marriage, and that they ought to find for the defendant, David Hanks, in this action.

The plaintiff objected to the giving of these instructions to the jury, and this objection was sustained by the court.

The plaintiff then moved the court to give these following instructions, which were objected to by the defendants:—

1st: That the jury may, in this case, find all or any of the defendants guilty according as they shall be satisfied, from the evidence, of the guilt of the defendants respectively.

2d: That in trespass all are principals, and if one person actually commits the trespass, and others aid, assist or advise the committing of the trespass, the persons so aiding, assisting, or advising, are equally guilty with the person actually committing the trespass.

3d: That in this action the jury may give damages over the value of the property by way of smart money, if they think proper.

The court overruled the defendants' objections to these instructions, and permitted them to be made to the jury. The jury found a verdict for the plaintiff, Baker, and the court entered a judgment thereon, a new trial was moved for, and the motion overruled.

The plaintiffs in error, defendants below, contended—

First: That the property taken and sold by them, if belonging to the estate of the deceased, Hanks, was properly sold as against the plaintiff, and that whether it belonged to that estate was a question of fact for the jury to find.

Second: That the court erred in not giving all and every the instructions to the jury which were prayed for by the defendants, now plaintiffs in error.

Third: That the court erred in giving the opinion which it gave the jury upon their return into court, after having retired from the bar. It appears on the bill of exceptions, that on the occasion referred to in this third instruction, one of the

jury inquired, whether the widow of Mr. Hanks was, on the death of her husband, entitled by law to keep, as her property, any stock on hand, and property, when it was not worth more than the sum of one hundred dollars, and if so, whether she would be entitled to the increase after his death, whether there was administration or not; and that the judge of the court answered, that he thought she would, but that no instruction had been asked on that point, and they would decide the matter for themselves.

Fourth point of plaintiffs in error: That the court erred in not setting aside the verdict, and granting a new trial.

Nothing is more true than that, on the death of Hanks, the property left by him would have belonged to the administrator had any person taken out letters; and by the law in force when Hanks died, the widow had the preference among the representatives of the deceased to take out letters of administration. (See Digest of 1825, p. 93, sec. 4, of the act concerning executors and administrators.) The same preference was given to her by the fifth section of the act respecting executors and administrators, article 2 of the Digest of the year 1835.

The widow, then, would have been inexcusable, if the estate left by her husband had been amply sufficient to pay the debts, and to furnish subsistence to the family, had she appropriated to her own use any of the property belonging to the estate, except what is expressly allowed to her by the act over and above her jointure or dower, to wit, her own and her husband's wearing apparels, her cards, wheels, looms, and other implements of industry, spun yarn, cloth, &c., made in the family for their own use; all meat, bread, vegetables, groceries, and other provisions for the subsistence of the family, beds, bedding, &c.

The law allows her also to take such property, goods, wares, and furniture not to exceed the appraised value of \$150, which shall be deducted from her dower, in the personal estate of the deceased, if any remain to her after the payment of the just debts of the deceased; and the property so delivered to the widow (it is declared) shall, in no case, be liable to the debts of the deceased. (See Digest of 1825, sec. 30, p. 103; also Digest of 1835, sec. 27-9, of article 2, p. 48.) The stock of cattle and hogs left by the deceased might have been selected by her had there been an administrator, and in such case, those articles of property would not have been liable to the debts of the deceased, as aforesaid. But what is the condition of this estate, as it appears from the evidence spread on the record? Hugh Tennille, a witness of the defendants in the suit below, states about the same amount of stock to have been left by the deceased, at the time of his death, as was stated by Jesse Hanks, a son of the deceased above-mentioned, except that Tennille said there were from 15 to 20 hogs, and that Jesse Hanks said there were betwixt 15 and 30 hogs. Both of these witnesses concur in stating that all the property left by the deceased was *gone*, before the administrator took the property, except one cow. Tennille, whose testimony has been already partly stated, says, that the deceased told him on his death-bed that he was leaving his family destitute; that he owed about seventy dollars, and his property would not pay his debts and support them. The witness adds—"All the property left at his death was not worth the seventy dollars: he knows the old lady, by selling pork that

winter, and with the boys' work afterwards, that a debt was paid by her to Craslin of 32 or 33 dollars." A marginal note in the record puts Compton for Craslin. In another place, it is in evidence that she paid Compton thirty dollars, paid another person four dollars, and defrayed the expenses of her husband's interment.

These several sums of money must amount to at least \$44, if we even admit that the debt stated to have been paid to Craslin and Compton are the same. Let it be recollected, that if the next of kin refuse or neglect to administer, then the law throws open the door to any person whom the court or clerk in vacation shall consider most suitable. There were creditors: none applied, for a very obvious reason; the widow would have claimed all the property, if any had been left, after paying the expenses of administration. For nearly eight years no letters were taken out. During this time the widow had the choice to take out letters of administration, and consume the property of the estate in defraying the necessary expenses of the administration before she could get her statutory allowance in due form of law, or to obey the calls of nature, more imperious than the commands of the law, and appropriate the property of the estate to the support of herself and the children of the deceased.

The law allows her to retain of the personal property of the deceased to the appraised value of \$150. It is proved by a witness of the plaintiffs in error, that all the property left by the deceased was not worth the seventy dollars which he declared, on his death-bed, he owed.

It is proved, also, that of this sum of seventy dollars, the widow paid at least \$44. No creditor or other person would administer in order to let the widow have her allowance under the statute. If she had administered herself, most of the small pittance left by her husband would have been consumed by the expenses; and by the 13th section of the 6th article of the act concerning administrations, Digest of 1835, it is provided, that "If upon the return of the inventory and appraisement, it appear to the court that there is not more than that to which the widow is by law entitled without being subject to the payment of debts, &c., the County Court may make an order in its discretion, that such estate be delivered to the widow.

There can be no doubt but the instructions asked by the plaintiffs in error state the law correctly, but this case is peculiar. This woman made herself executrix, *de son tout per force*. In her it was a meritorious act; no creditor would administer, the children were too young; she took possession of the property, less in amount than the law would have given her; she paid the debts of the deceased, and fed and clothed her infant children. The case is one *sui generis*, and had the instructions prayed by the plaintiffs in error been given, a jury would still have been justifiable in finding as they did. Nobody else would have taken charge of this property as this woman did. If she had not appropriated it, all of it would have been lost to the creditors and the widow and children of the deceased. And now, eight years after the death of the husband, when she has paid the debts, fed and clothed the children, an administrator comes to sweep from her the property created, as it were, by her good management.

Had there been any fraud or concealment of the property proved, the case would

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have been altered; but, as it appears on the record, all is fair, and the witnesses of plaintiffs in error testify most strongly in favor of the conduct of the widow of the deceased.

For one year, it appears in evidence, the plaintiff below, defendant in error, had been married to the widow, and in the full possession of this property, and the services of the widow, now the wife of the defendant in error, over and above her payment of the debts of the deceased, are worth much more than the property was when she took it into her care; that there is any increase of the stock of cattle and hogs is owing to her diligence. If letters of administration, it is repeated, had been taken out immediately after the death of Hanks, all the property would have been less than the law would have allowed to her. It would be more than unjust, then, after eight years, to come with letters of administration, and sweep from her this property, as increased by her labor, when, too, with that property she has paid the debts and fed the children.

We are of opinion, then, that the judgment of the Circuit Court ought to be affirmed, and it is accordingly affirmed.

GLASSCOCK vs. BANK OF MISSOURI.

1. Notice of the dishonor of a bill may come from any person who holds the bill when it is dishonored, or is a party to the bill, and the holder may avail himself of the notice given in due time, by any other party to the bill, against any other person upon the bill who would be liable to him, if he, the holder, had himself given due notice of the dishonor.
2. Where notice of the dishonor of a bill is given by an endorser, and his name is subsequently erased from the bill by the holder, the liability of prior endorsers will not be affected thereby; the holder of a bill having a right to strike out the names of many endorsers as he sees proper, provided they are subsequent to the endorsement of the party whom he seeks to hold liable.
3. It is not indispensable for the notice of the dishonor of a bill to be sent to the post-office nearest to the residence of the party, nor even to the town in which he resides, if it be, in fact, sent to the post-office to which he usually resorts for his letters.

APPEAL from Ralls Circuit Court.

WILLIAM M. CAMPBELL, *for Appellant.*

1. The name of South having been erased by the plaintiff from the back of the bill of exchange in the possession of plaintiff, and he being not mentioned in the declaration, is to be considered as an entire stranger to the whole transaction, and a notice sent to him at Palmyra is of no more legal force and value than would have been a notice sent to any other citizen, or to any other town in Missouri.

2. There is no legal evidence that any legal notice of protest was ever served on Glascock, or on any other endorser to the bill of exchange.

3. The evidence proves that Stephen Glascock's place of residence was in New London, and that that was his post-office, and the fact that he sometimes did business at Hannibal, and there received letters and newspapers, will not render that his post-office, in contemplation of law.

4. The notice of protest should have been mailed from St. Louis to Glascock at his proper post-office, and not to South at Palmyra.

5. There is not satisfactory evidence that the notice was mailed in St. Louis by the first mail after protest, nor that the notices sent were copies of the notice given in evidence, and therefore the evidence on that subject was illegally admitted.

6. The grounds assumed by the court, in the instruction asked for by the Bank, were not warranted by the law of the land, under the circumstances of the case.

7. The court should have granted a new trial.

LEONARD and BAY, for Appellee.

1. It was unnecessary to claim "*interest*," *eo nomine*, in the declaration. Interest on a bill or note is to be considered as damages for the detention of the principal debt, and is nothing more than a measure of damages.—Bailey on Bills, 281; Du Belloix vs. Waterpark, 1 D. and R., 16; Cameron vs. Smith, 2 B. and A., 305.

The endorser of a bill is liable to pay interest in the nature of damages, from the time he receives notice of the dishonor. (Chitty on Contracts, 505; Story on Bills, 466.) In assumpsit, the ground of action is the damages sustained by the plaintiff.—1 Chitty's Plead., 122.

2. It was not necessary to prove the signatures of the prior endorsers. The endorsement of a bill of exchange is an engagement on the part of the endorser that the signature of the drawer, and also of the antecedent endorsers, are genuine.—Jones vs. Ryde, 5 Tam., 488; Story on Bills, 126.

3. Notice of non-payment may be given by any party to the bill, or by the agent of the holder. (Story on Bills, 454.) Each successive endorser receiving notice has until the next day to send notice to antecedent parties; (*Ibid.*, 453, 325-327;) and such notice enures to the benefit of all the other parties to the bill.—*Ibid.*, 341, 342.

4. Where the domicile of a party is in one town, and his place of business in another, notice may be sent to either, especially if the party is accustomed to receive notices and letters, at the post-office of each town. It is not indispensable for the notice to be sent to the post-office nearest to the residence of the party, nor even to the town in which he resides, if it be, in fact, sent to the post-office to which he usually resorts for his letters.—Story on Bills, 260, 261, 332; Reed vs. Paine, 16 Johns. Rep., 218; Catskill Bank vs. Stall, 15 Wend., 364.

5. If the foregoing positions are correct, then the instruction given by the court contains a correct exposition of the law applicable to the facts in evidence, and the instructions asked by the defendant were properly refused.

NAPTON, Judge, delivered the opinion of the Court.

The Bank of Missouri brought suit against the appellant, as endorser of a bill of exchange for five hundred dollars, drawn by David O. Glasscock, in favor of William Moss, on Righter Levering, of St. Louis, and payable four months after date. The Bank obtained a judgment for \$627 47.

On the trial, objection was made to the introduction of the bill of exchange in evidence, because the last endorsement on the bill (subsequent to the endorsement by Stephen Glascock) was stricken out. The objection was, however, overruled.

The bill was drawn the 31st August, 1839, and payable four months after date, and was protested for non-payment on the 3d January, 1840. Notice of the protest was sent by mail, on the day following, to S. D. South, the last endorser, directed to Palmyra, and, by S. D. South, forwarded by the first mail to Hannibal, Marion county, and directed to the defendant, Glasscock.

It was proved by S. D. South, the last endorser—whose name appeared stricken out when the bill was submitted to the jury—that when he received notice of protest, his name was on the bill, and that it was subsequently erased without his knowledge.

Testimony was given, conducing to show that the defendant resided in the country, nearer to New London than to Hannibal; that he received letters and papers at both post-offices; that he was president of a chartered company in Hannibal; that the business of the company was performed chiefly there, and the defendant was frequently there, and received two newspapers at that office.

The court, at the plaintiff's instance, instructed the jury, that notice of protest sent the day after the protest, to the last endorser, South, and a notice, by South, sent by the first mail after his receipt of the same, and directed to the defendant at Hannibal, was sufficient to hold defendant liable; provided they were satisfied that the defendant was, at that time, as much in the habit of receiving his letters, papers and communications at the Hannibal post-office as at any other.

Counter instructions were asked by the defendant, in substance declaring the law to be, that the notice must be sent to the *nearest* post-office, and that a notice directed to the Hannibal post-office was insufficient, unless the jury were satisfied that the defendant was in the habit of receiving more of his letters and papers at that office than at any other.

The only questions presented by the record arise out of the instructions of the Circuit Court, and we are of opinion that these instructions were correct.

Judge Story, in his late work on bills of exchange, considers the law as settled, that notice of the dishonor of a bill may come from any person who holds the bill, when it is dishonored, or is a party to the bill, and the holder may avail himself of the notice, given in due time, by any other party to it, against any other person upon the bill who would be liable to him, if he, the holder, had himself given due notice of the dishonor. (Story on Bills, 304.) This principle was recognized by this Court at the last term, in the case of *Glasgow vs. Pratte*.

It was proved that South was a party to the bill when he gave notice of its

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dishonor to the defendant. The subsequent erasure of his name could not affect or alter the liability of the defendant, who was a prior endorser. The Bank, who held the bill, had an undoubted right to strike out as many endorsers as she thought fit, provided they were subsequent to the endorsement of the defendant.

With regard to the instruction of the Circuit Court, relative to the post-office to which the notice should have been directed, it is not considered indispensable for the notice to be sent to the post-office nearest to the residence of the party, nor even to the town in which he resides, if it be, in fact, sent to the post-office to which he usually resorts for his letters.—Story on Bills, 297, and cases cited.

Judgment affirmed.

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Where there is conflicting evidence, and no instructions are asked, the verdict will not be disturbed unless there is a great preponderance of evidence on the side of the party against whom the verdict is rendered.

ERROR to Boone Circuit Court.

TURNER and STONE, for Plaintiffs in Error.

1. It was the duty of the defendant to have made a reasonable effort to find Jennings' property, and he should not have contented himself with going to his house and demanding property. (See 2 Pirtle's Dig., 392; 1 J. J. Marshall's Rep., 551, *Bell vs. The Commonwealth*.) And it is evident, that if he had used reasonable diligence, he would have found Jennings' horses, which, during the spring and summer, according to the testimony of one of the witnesses, ran upon the range only a mile from home.

2. The law, at that time, allowed the heads of families alone to keep a horse. (See Revised Statute of Missouri, p. 255, being the 15th section under the title "Executions.") And as there is no evidence to show that the defendant in the execution was the head of a family, it was the duty of the constable to have levied upon the horse which he saw in Jennings' possession.

3. Admitting that Jennings was entitled to a horse under the law, it was the duty of the constable to have levied upon the horse, and to have caused the same to be appraised by three disinterested householders.—See Acts of 1840, '41, p. 76, title, "Executions."

4. The growing corn was subject to execution, and ought to have been levied upon and sold.—See 1 Johns. Dig., 606, 610, *Whipple vs. Foot*; 2 Johns. Rep.,

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418, 422, Hartnell *vs.* Bird; 17 Johns. Rep., 128; 2 J. J. Marshall's Rep., 159, Parkham *vs.* Thompson; 1 Pirtle's Digest, 487, title, "Growing Crops of Corn," &c. A growing crop is a chattel. See 2 Tidd's Practice, 917; 2 Black. Com.; 2 Johns. Rep., 52, Nobb *vs.* Smith; also 1 Pirtle's Dig., 487.

HAYDEN, for Defendant in Error.

1. The constable could not levy upon and sell under execution growing and immature corn, because it is part of the realty, but that even if it could be levied upon, there is no breach of the condition charged in the declaration for not having levied thereon.—See Davis *vs.* Barns, 3 Mo. Reports, 137, 8; 2 Black. Com., ch. 25; 2 *Ibid.*, 407, 8.

2. The proof does not show that the constable knew of any property within his township subject to the execution; nor does the proof show any within the township.

3. The subsequent execution and levy upon property of Jennings is a satisfaction of the debt, and, of course, released the constable. The last levy made by the constable is still alive and valid, and is a satisfaction of the judgment.

4. That the crop of corn was liable for the rent, and was not sufficient to pay the same, and therefore, if liable to be levied on, the constable exercised a sound discretion in not levying upon and selling the same.—2 Dana, 207.

5. The defendant in the execution had a right to retain the crop as a part of his provisions by law.—See Digest Mo. Laws, 255.

6. That in this case the Circuit Court found the facts correctly, and did not err in law in refusing to set aside the finding, and in giving judgment for defendant.

TOMPKINS, Judge, delivered the opinion of the Court.

This is an action commenced by Nathaniel W. Wilson and Walter W. Wilson, against the defendant, Wesley Burks, before a justice of the peace, on the official bond of Burks, as constable of a township in Boone county. The justice of the peace rendered a judgment against the plaintiffs, and they appealed to the Circuit Court of Boone county, where the court, neither party requiring a jury, again gave judgment for the defendant.

No instructions were asked, or rather, the Circuit Court was required to declare, or to decide no point of law arising on the evidence given in this case. In such a case, unless the evidence of the plaintiffs was much stronger than that of the defendant, the verdict and judgment of the court ought to stand. It is the peculiar province of a jury to weigh the evidence and the credibility of witnesses. In this case, there was conflicting evidence, and two verdicts were found for the defendant, and no instructions being asked, it is not seen that any rule of law is violated.

Therefore, let it suffice to say, that it is not believed that in this case the evidence of the plaintiffs is so strong as to induce this court to reverse the judgment of the Circuit Court.

The judgment of that court is, then, affirmed.

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RECTOR vs. HARTT.

1. It is well settled that the owner of land may, without deed or writing, dedicate it to public uses. No particular form or ceremony is necessary in the dedication. The assent of the owner of the land, and the fact of its being used for the purposes intended by the appropriator, are sufficient to constitute a dedication. But where such owner is interested in proving such dedication, and seeks to gain some advantage thereby, he will be held to strict proof of a dedication, and evidence that would have established a dedication as against him will not be sufficient.
2. The plaintiff was the owner of a quarter of a section of land, about twenty-five acres of which was laid off into forty-eight town lots. The plaintiff was the owner of the entire quarter section, with the exception of one of the lots, ninety by one hundred and fifty feet. The streets and alleys were unopened, designated by no monuments, and covered with brush and timber with a single highway through the tract. Under an execution issued on a judgment against the plaintiff, the sheriff levied upon the whole quarter section, describing it as the north-west fractional quarter of section 35, township 49, range 17, and sold the whole tract by such description: *Held*,

That the description was sufficiently certain; that this case was clearly distinguishable from the case of *Evans vs. Ashley* (8 Mo. Rep., 177,) where a tract of 12½ arpens was laid off into town lots, and the defendant in the execution was the owner of six of the lots by purchase from the person who laid off the tract into lots, and the sheriff, under such execution, sold the whole tract by its original description.
3. The 13th section of the act of February 21, 1825, concerning Executions, providing, "that in all cases where execution shall be levied upon any real estate, the sheriff shall divide the property, if susceptible of division, and sell only so much thereof as will be sufficient to satisfy the execution," &c., is directory. A violation of its injunction will not make a sale void, although it may be good cause for setting it aside. Every application to vacate or set aside a sale so made must be governed by its own circumstances: no general rule can be laid down upon the subject.

ERROR to Cooper Circuit Court.

HAYDEN and MILLER, for Plaintiffs in Error.

1. A sheriff has power and authority to sell real estate in mass, or in the entirety, under execution, although it may be susceptible of division, and may, in fact, consist of several pieces; the statute, pointing out the mode of selling land under execution, is merely directory, and a non-compliance with its provisions does not render the sale void. — *Woods vs. Morrell*, 1 Johns. Chan. Rep., 501; 2d part of New York Digest, p. 1,022, sec. 510, 511; 6 Wendell, 522; *Hicks & Hammonds vs. Perry*, 7 Mo. Rep., 346; 1 Monroe's Ky. Rep., 94, 5.

2. Whether the sheriff, in making a sale under execution, pursues the directions of the statute — viz., whether he sells in mass, or in lots, or parcels, is a matter which cannot be inquired into collaterally. In such cases, relief or redress can only be had by direct application to the court under whose process the sale is made, or by resort to a court of equity, where, if the sale be set aside, all parties may be placed *in statu quo*. — *Thompson vs. Phillips*, 1 Baldwin's Cir. Court Rep., 271, 2, &c.; 11 Serg. & Rawle, 424; 2 Peters' Rep., 163-9; *Thompson vs. Tolmieri*, 10 Peters' Rep., 450, 479; 6 Wend. Rep., 522; 3 Wash. Cir. Rep., 550,

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557; 3 Marshall's Ky. Rep., 281; 1 Bibb's Rep., 155; 2 *Ibid.*, 518, 202; 7 Mass. Rep., 292-6; 11 *Ibid.*, 227; 3 Howard's Rep., 64, 5; 1 Serg. & Rawle, 101; 2 Harrington's Rep., 474; 1 *Ibid.*, 477; 1 Monroe's Ky. Rep., 94.

3. The acknowledgment of a sheriff's deed is a judicial act, and is in the nature of a judgment of confirmation, which cures all defects in the mode of sale which the court issuing the process had the power to remedy. The purchaser depends upon the judgment, the levy, and the deed of conveyance: all other questions are between the parties to the judgment and the sheriff; and the object of our statute, in requiring the deed for the land to be acknowledged by the sheriff in open court, is—to enable the court to see and know that the sheriff, in making the sale, has not abused the process under which the sale was made, and to afford the parties interested an opportunity, before the confirmation of the sale, to make to the court any objections which they may have thereto.—Baldwin's Cir. Court Rep., 272; 1 Serg. & Rawle, 101; 4 Yates, 214; 6 Binney, 254; 2 Serg. & Rawle, 54, 55.

4. Even if the acts of the officer, in making the sale to Adams, could be inquired into collaterally, yet, under the circumstances of this case, the sheriff, in making the sale, did not exercise his discretion unsoundly, for the following reasons:—1st. Because there were no monuments, or other evidence, upon the land itself, showing that any part of it had been laid off in lots for separate and distinct enjoyment; on the contrary, there was but one single tenement or house thereon; nor were there any streets, lanes, or alleys cleared or opened, by which the sheriff could have been guided in making his levy and sale of the land in lots; nor was there any town plat made, signed and acknowledged, as required by law, recorded in the recorder's office of Cooper county, by Hartt, or by any one else, to which the sheriff could have referred, showing that there were town lots laid off upon the *land in dispute*; and to have required the sheriff to have made his levy, advertisement and sale of the land in lots or parcels, describing them with sufficient certainty to point out to the purchaser what he was buying, would have been requiring of him, under the *circumstances of this case*, an impossibility.

5. The sheriff could not sell, neither was he bound to sell, the real estate of Hartt, under execution, *as town lots*, and in a manner that Hartt *could not* sell it himself; and, at the time of the sale to Adams, Hartt could not have sold any part of the quarter section of land as town lots, without subjecting himself to a severe penalty for the transgression; and he could not require the sheriff to trample upon the statute for his benefit.—2 Digest of 1825, p. 763, sec. 1-4.

And aside from this statute, Hartt being merely a tenant in common with others in the quarter section, could not have sold to any person any particular part of the quarter section by metes and bonds, nor could he grant a servitude therein without the consent of his co-tenants; nor could the same be executed by extent, &c., in parts by metes and bounds, the same being void at common law. That the whole, or a part only, of his undivided interest in the *whole tract* of land could be sold by him, or upon execution by the sheriff.—4 Kent, lecture 64, p. 368; 3 *Ibid.*, p. 436, lecture 52; 9 Mass. Rep., 34; 18 Maine Rep., 229; 9 Vermont Rep., 138; 12 Mass. Rep., 348, 490; *Vamain vs. Abbott*, 13 Mass. Rep., 257; 14 Mass., 404; 2 Conn. Rep., 243.

6. By the law of this State, there is but one way or mode by which a person owning land can legitimately lay off a town upon his land, and sell lots therein by himself or by another, and that is the one which is pointed out in the act above referred to, and which has been since in substance, if not in words, re-enacted. And there are but two ways, or modes, of dedicating streets and alleys to the use of the government, and those must be either by *express grant*, as is pointed out by the statute above referred to, or by the *actual use* thereof as a *public thoroughfare by the public*, for so great a length of time as to give rise to the presumption that such use thereof was, and is, *with the consent* of the owner of the land, amounting to *prima facie* evidence of a grant to the public of the servitudes; and perhaps this may be yielding more than by our statutes is warranted. But in this case the streets were never used or opened prior to the sale.—13 English Com. Law Rep., 45, 46; *Jarvis vs. Dean* (same case in 3 Bingham, p. 447), 2 Strange's Rep., 1,004; *Sir John Lade vs. Shepherd*; *Roberts vs. Kar*, 1 Campbell, 262; 6 Peters' U. S. Rep., the *City of Cincinnati vs. the Lessee of White*, p. 433, and following.

7. The Circuit Court erred in permitting Hartt to read, in evidence to the jury, the copy of the deed of release to Thomas Rogers, as also the other deeds of release for certain lots, for the following reasons:—1st. They, and each of them, were irrelevant, having no tendency to show that he (Hartt) had laid off any town lots upon the *quarter section* sued for, or that he had adopted the laying off lots by Morgan and Lucas; for the *only plats* in the possession of the recorder, and to which reference in the deeds can be supposed to apply, are the plats wafered in the recorder's books, which are *not signed or acknowledged* by Lucas and Morgan, or any one else, as the owners of lots intended to be represented by them; and even if they had been, or were, signed and acknowledged by Lucas and Morgan, there is nothing stated upon the *face* of these plats which shows that the lots therein represented are situate upon the *land* sued for, nor on *what land* situate; therefore, these deeds and plats, taken separately or in connection, could not have informed the sheriff that there were lots laid out upon the land, so as to have guided him in the levy and sale; and he was not bound to inquire for deeds *in the country*, or to guess where the lots on these plats were situate: and the plats not being recorded or acknowledged, *agreeably* to law, were not notice to any one.

The copy of the deed to Rogers was improperly admitted, without accounting for the non-production of the original, even if such evidence were relevant.

The other deeds being for lots off of the quarter, as proven by the witnesses, did not conduce to show any dedication of streets on the quarter; and so it is in this case: as the streets and alleys were not *expressly* dedicated or granted to the public by Hartt, nor *ever used by the public as such*, the mere deed of release to Rogers conferred no *public right* to streets, &c., but carried a mere *private right* in favor of Rogers, the grantee, to pass to and from the lot released, over the adjacent lands of the grantor.

8. The court erred in refusing to permit the defendant, Rector, to read from the record book of recorded deeds the copy of the deed from Wm. M. Adams to Mary Gilman, under whom defendant claimed title to the lot of which he was possessed,

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after proving that the original had been, many years since, delivered to the agent of Mrs. Gilman by the recorder, both of whom being resident citizens of Kentucky. — 7 Pickering's Rep., p. 10.

9. The Circuit Court erred in rejecting the record of the proceedings of Hartt, whilst in custody upon *the same execution* under which the land was sold, to obtain the relief granted by statute to insolvent debtors; in which proceeding, within one month from the time of sale, he expressly declared and swore, in writing, that he did not own but one lot in Boonville, and owned no land, and this lot was not on the quarter sued for. From this *sworn declaration*, taken in connection with other circumstances proved on the trial, the jury could well infer that the land had been sold by the sheriff with his consent, he not offering any proof that he had sold it himself; especially when taken in connection with the facts that he had made no objections to the sale, though made so recently in his presence, and having stated in his said proceedings, as an insolvent, the balance of the debt yet remaining due Smith (plaintiff in the execution), after receiving the credit endorsed by the sheriff. The said written and sworn statement, *virtually* acknowledging a transfer of the property mentioned in the patent, and negating the idea that *he then owned* any lots upon the quarter, none being mentioned. If the land or lots had been sold by him prior to this proceeding, when was it, and to whom?

10. The Circuit Court erred in rejecting the record of the assessment made by the assessor of Cooper county, in the year 1828, of Hartt's lands, by which assessment it appears that Hartt assessed no town lots upon the quarter, though twelve years after the alleged laying off of the land in lots by Morgan and Lucas, and eight years after the date of the deed of release to Rogers of a lot. This proof was offered to negative the idea, that Hartt claimed or held the land in separate or distinct lots, and to show that he claimed and held it *as it was* patented to him, and as he sues for it *now*, by *its name* — "N. W. quarter of section No. 35, T. 49, &c."

11. The court erred in overruling the motion of the defendant to exclude from the jury all the evidence given by plaintiff with reference to the laying out lots, &c., upon the land, by Morgan and Lucas, *adverse claimants* upon the land in the year 1816, of which the sheriff could not be presumed to have knowledge at the time of the sale to Adams, *thirteen years afterwards*, a matter in *pais*, and of which he would not have been bound to take notice had the same been done recently, next preceding the sale, by *these adverse claimants*.

And, upon the same principle, the sheriff could not be presumed to know anything respecting the act of conveying, by *release*, to Rogers, nine years prior thereto; and if he did not know it, he was not bound to take notice of the act, as it is not presumable he could know with what intent the deed was made; and, besides, the *copy* was inadmissible, and the whole of it irrelevant, as before stated, and ought to have been rejected.

12. In this case, as the sheriff had power to convey all the right and title to the land, and did convey the same, to Adams, until that sale is set aside by some *direct* proceeding, making Adams a party, the legal title thereby acquired must, and will, prevail against the plaintiff in this action, though the title of the defendant, Rector, be never so weak.

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13. Even if the title acquired by Adams, under the execution sale, could be inquired into *collaterally* in this action, yet as the legal title passed by the conveyance of the sheriff to him, such title cannot be disturbed or disregarded in this controversy, unless, from all the circumstances, it appears that the sheriff, in the levy and sale, conducted himself so improperly and flagrantly in violation of the rules of law, conscience and equity—and that the purchaser connived at it, or participated therein—as to warrant a court of equity, in a *direct proceeding* by bill in chancery, to set the same aside; and in this case we insist, that, so far from the sheriff having acted oppressively, fraudulently, or improperly, he acted fairly, honestly, and with as much prudent and sound discretion as any man could have done under the same circumstances, possessing the intelligence common to mankind; and as Hartt was present at the time of the sale, and made no objection to it, *accepted* a credit upon the execution against him, and has acquiesced nine years in the sale, and until a city has been built upon the land—a lapse of time doubly, or nearly doubly, as long as is allowed him by our statute to reverse the proceedings of the court rendering the judgment for error therein, or for irregularity in the execution of it—it would be an encouragement to fraudulent debtors for this court to sanction the objection set up by Hartt to the title acquired by Adams under said sale; and it would be establishing a doctrine directly in contact with the well-settled principle in equity—“That he who is silent when he ought to speak, shall not be heard to speak when he ought to be silent.”—6 Johns. Chan. Rep., 166; Storrs & Brooks *vs.* Barker; Sugden on Vendors, 299, &c., and authorities referred to; 4 Blackford's Rep.; *Ibid.*, on the demise of McGuire *vs.* Smith, 228-31; 6 Johns. Chan. Rep., Fernan *vs.* Wilson and others, 411, P. C.: this case points out the circumstances, &c., which ought to vitiate a sale by sheriff.

14. The appellant insists, that there is a difference between a sale and conveyance made by a sheriff having power and authority under a valid execution, in the presence of the debtor, who is silent, and does not object to a sale to an innocent purchaser, and the case of a sale made by a person pretending to have title when he has none, to an innocent purchaser, in the presence of the *real owner*, who is present, and keeps his title or right to the land secret from the purchaser. In the former case, the legal and equitable title passes; and in the latter, the equitable title only passes, and places the purchaser in a condition to wrest from the hands of the person who has the legal title, for *his fraud* in keeping secret his title from the purchaser.

15. The court erred in giving to the jury the fourth instruction asked by Hartt, in this—that by the instruction the jury were told, that if they found, from the evidence, that before the issuing of the execution against Hartt & Tennell, under which the sale was made to Adams, a portion of the quarter section had been laid off into town lots, embracing lot No. 113 (the one in controversy), for separate and distinct enjoyment by persons claiming adversely to Hartt, and that a plat of the lots, streets and alleys had been made, and was deposited in the office of the clerk of the Circuit Court of Cooper county; and that afterwards, and before the issuing of said execution in favor of Smith, Hartt, or those under whom Hartt claimed, *adapted* such laying out of the ground into town lots, streets and alleys,

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by conveying to others any of such lots so laid out, describing the same in the deed of conveyance by reference to the plat, or by any other act; and further find, that the sheriff sold the whole quarter section in one lot to Adams, as alleged in the deed to Adams; that such sale is void, and does not divest the plaintiff of his title created by the patent, unless the jury find, from the evidence, that Hartt desired the sheriff to sell the whole quarter section together.

The appellant insists, that the court, in giving this instruction, violated the law in two particulars: — 1st. It required them to take the *mere fact* of releasing the lots by Hart, by deeds, referring to the plat deposited in the clerk's office as *conclusive evidence* of his intending thereby to adopt the acts of the adverse claimants in laying off lots upon the land; whereas, at most, it could amount to *nothing more than evidence* from which the jury could have inferred that Hartt intended to adopt the plat, to be weighed against the opposing evidence given by defendant: but, 2d, it was no evidence under the view presented in the seventh point above made.

16. The court erred in refusing all and every of the instructions asked for by the defendant; and for the reasons urged against the rejection of the instructions of defendant, so asked, appellant's counsel refer to their argument at large in their original brief.

LEONARD, for the Defendant in Error.

1. If an execution sale be *void*, and not merely *voidable*, such invalidity may be shown in any proceeding in which the sale comes collaterally in question. — *Woodcock vs. Bennett*, 1 Cowen's Rep., 739.

2. In order to constitute an execution sale not merely void, it is not sufficient that there be a judgment execution and sale in fact; other things are requisite; some prescribed by the statute law, and others by the rules of right reason applicable to the subject. — *Litchfield vs. Cudworth*, 15 Pick. Rep., 28; *Williams vs. Amory*, 14 Mass. Rep., 29; *Shield vs. Soper*, 14 Johns. Rep., 352; *Lawrence vs. Spead*, 2 Bibb's Rep., 401; *Storer vs. Boswell*, 3 Dana's Rep., 235; *Wordye vs. Barlay*, Noys' Rep., 59; *McGuire vs. Smith*, 4 Black. Rep., 228; *Reed vs. Carter*, 3 Black. Rep., 377; *Pepper vs. The Commonwealth*, 6 Mon. Rep., 30; *Gordon vs. Rankin*, 2 Harrington's Rep., 474; *Patterson vs. Carneal's Heirs*, 3 Marsh Rep., 619; *Davidson vs. McMurtry & Ellington*, 2 J. J. Marshall, 36, 68.

3. The sheriff's sale, under the execution of October, 1828, is void, so far as the town lot in controversy is concerned, and not merely voidable: —

I. For uncertainty in the description of the property sold. This lot was one of the forty-eight town lots into which about twenty-five acres of the whole quarter had been laid out, with intervening streets and alleys, dedicated to the public, of which lots the plaintiff was the owner of forty-seven, having previously sold one of them to a third person; and the lot now in controversy is described in the levy, advertisement, sale and deed, and passes, if it passes at all, only as an undefined part of the whole quarter section, out of which it was carved. — *Symonds vs. Catlin*, 2 Carnes' Rep., 65; *Jackson vs. Rosevelt*, 13 Johns. Rep., 97; *Jackson*

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vs. Delancy, 13 Johns. Rep., 537; *Hartt vs. Rector*, 7 Mo. Rep., 531; *Evans vs. Ashley*, decided in this court, July Term, 1843.

II. The whole quarter section, embracing as well the forty-eight town lots into which part of the tract was subdivided, as the residue of the quarter, containing about 130 acres, was sold in mass, and not in separate parcels; and this is such a gross abuse of power on the part of the sheriff, as does of itself, in point of law, annul the sale, no matter what may have been the actual interest of the sheriff or of the purchaser. — Revised Statutes of 1825, p. 367, sec. 13; *Rowley vs. Webb*, 1 Binney's Rep., 62; *Tiernon vs. Wilson*, 6 Johns. Chan. Rep., 414; *Jackson vs. Newton*, 18 Johns. Rep., 355; *Rierson vs. Nicholson*, 2 Yeates' Rep., 516; *Nesbitt vs. Dallam*, 7 Gill. & Johns., 512; *Berry vs. Eryfifth*, 2 Har. & Gill., 338.

4. The reception, by a Circuit Court, of the acknowledgment of a sheriff's deed, is not a judicial confirmation of the sale, and has never been so considered in this State, either in theory or practice, and cannot be so considered in the case at bar. Here the sale was made by an officer of this court, under an execution and judgment of this court; and the Cooper Circuit Court certainly had no power to vacate or confirm a sale made under such authority.

5. If the sale be void, and not merely voidable, such invalidity is not cured by the presence of Hartt at the sale, and his omission to object to it, or by any other act now insisted upon by the defendant for that purpose. — *Storer vs. Boswell*, 3 Dana's Rep., 235; *Pepper vs. Commonwealth*, 6 Mon. Rep., 30.

6. A recognition and adoption by Hartt, and the other pre-emption patentees, of the town plat, filed by the New Madrid claimants, is a valid subdivision of the ground into lots, streets and alleys, and a valid dedication of the streets and alleys to the public. — *City of Cincinnati vs. White's Lessee*, 6 Peters' Rep., 440; *Barclay vs. Howard's Lessee*, 6 Peters' Rep., 513; *New Orleans vs. The United States*, 10 Peters' Rep., 662; *Beatty vs. Kurts*, 2 Peters' Rep., 256; *Powlet vs. Clark*, 9 Cranch's Rep., 292; *McConnell vs. Trustees of Lexington*, 13 Wheat. Rep., 582; *Brown vs. Manning*, 6 Ohio Rep., 298; 3 Kent's Com. (4th edit.), 450, 452.

7. The sale and conveyance, by the plaintiff and the other pre-emption patentees, of lots in the town, describing them by reference to their numbers on the plat filed in the clerk's office, is a recognition and adoption of such plat, and concludes them upon the question of the dedication of the streets and alleys. — 3 Kent's Com. (4th edit.), 450; in the matter of 32d street, 19 Wend. Rep., 128; 3 Kent's Com. (4th edit.), 432, 433, and cases there cited.

8. All the evidence of title in Huff or Potter, or other third person, or of title out of the plaintiff, and all the other evidence offered by the defendant, and rejected by the court after the plaintiff had closed his rebutting testimony, was either irrelevant to the issue, or only admissible as evidence in chief.

SCOTT, J., delivered the opinion of the Court.

This was an action of ejectment, commenced by G. C. Hartt against Charles Rector, for the north-west fractional quarter of section thirty-five, in township

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forty-nine of range seventeen west, situate in Cooper county: the plaintiff had verdict and judgment.

On the trial, the plaintiff gave in evidence a patent from the United States to Henry Carroll, G. C. Hartt, and Robert Wallace, assignees of the pre-emption of Hannah Cole, for the tract of land in controversy, dated 19th November, 1822, and proved that the defendant was in possession of a part of the tract of land in dispute at the commencement of this suit.

The defendant read in evidence the transcript of a judgment of the Supreme Court of this State, in the name of T. A. Smith *vs.* G. C. Hartt and G. Tennille, and an execution thereon for the sum of \$580 and costs, directed to the sheriff of Cooper county. It appears from the record, that, under this writ, the sheriff sold the land in controversy, together with other real and personal estate of G. C. Hartt, for the sum of \$360 31 $\frac{1}{4}$, on the 17th of February, 1829. A deed was executed by the sheriff to W. M. Adams, the purchaser of the land in dispute, which was described in the advertisement of sale as the north-west fr. qr. section thirty-five of range seventeen west, and of township forty-nine, containing 152 acres, or thereabouts. The deed conveyed to him, for the sum of \$100, all the right, title, claim, and interest of the said G. C. Hartt in the said tract. This deed was dated the 17th February, 1829, and acknowledged at the same term of the Cooper Circuit Court of the same year.

The plaintiff then read in evidence a plat of the town of Boonville. This plat was not authenticated in any manner: it was not signed or acknowledged by any person. The clerk of the Cooper Circuit Court testified that he had been in the office about ten years; that the plat was in the office when he first went into it, and is attached by a wafer to the last page of deed-book A, and immediately following the last deed in said book, which was recorded on the 24th June, 1820.

A second plat of the same town, similar to the first, with an addition of town lots, was also given in evidence. No marks of authenticity were on this plat: in this respect it was like the first. There was a memorandum on the plats, that full lots are ninety feet by one hundred and fifty; that the streets are seventy-five feet wide, and the alleys fifteen. The last plat was laid off on a page of deed-book B, and immediately succeeding the page upon which a deed is recorded, dated 28th February, 1824, and immediately preceding the page on which a deed was recorded on the 1st of April, 1824. The county surveyor being introduced as a witness, in answer to the question whether the first plat was a plat of the town of Boonville? testified, that the lots, names and widths of streets, corresponded with some in Boonville, and that he had always taken it to be a plat of said town; that the last plat only varies from the first by a small addition to the number of lots; that for seven or eight years he has surveyed lots in Boonville, and been guided by one or the other of said plats; he knew of no other plat but these, which he first saw in the year 1835; that there are 235 lots on the plat, forty-eight of which are on the land in dispute.

The town of Boonville was first laid off in 1816 or 1817: the town was first built upon the land in dispute: at one time there were eight or ten families upon it; before 1830 they all, except one, had removed from it. A witness testified,

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that, as agent for Mary Gilmore, he, with Morgan and Lucas, made a donation of land to Cooper county for a seat of justice, in 1817 or 1818, and that he knew lots were sold prior to that time by Morgan and Lucas; that he, as attorney for Mary Gilmore, referred to a plat of Boonville, in conveying, as early as 1819; that the town was laid off by Morgan and Lucas, on a New Madrid location; that Hartt pretended to no claim until after the town was laid out, and always claimed adversely to Morgan and Lucas. The plaintiff gave in evidence three several deeds — one executed by himself; one by himself, H. Carroll and B. Lockhart; and one by the three last-named grantors and Robert Wallace, bearing date respectively 28th December, 1821, 26th January and January 29th, 1820, releasing to the several alienees therein named, for the sum of five dollars, by them severally paid, all their right, title, interest and estate in those several lots in the town of Boonville, and describing the said lots by reference to the town plat above-mentioned: one of these three lots was on the tract of land in dispute. Witnesses intimate with plaintiff testified, that they never knew him to recognize the town laid out by Morgan and Lucas, who claimed adversely to Hartt; that all the families but one on the fractional quarter section in controversy abandoned it before February, 1829, and went to live on lots donated to the county. No stakes, stones, or monuments designated the boundaries of the lots; that the land was covered with brush and wood; no indication of a town; but one road passed through it; it was known that part of it had been laid off into town lots; it was not enclosed. Hartt frequently complained of persons cutting timber in streets and alleys, and forbade them from so doing. A son of the only tenant who continued upon the land, testified that he came to Boonville in 1818, and lived with his father until his death in 1826; that his father never claimed title under Hartt; that Hartt frequently forbade him from cutting trees on the streets and alleys; that there were four different occasions upon which Hartt interdicted him from cutting timber; that on two occasions, after he had cut wood in the streets, Hartt took it from him, and hauled it away; that he was once cutting a bee tree in a street, and Hartt came to him and forbade him from so doing; he told Hartt he was cutting in a street; Hartt replied, "It is immaterial — it is all private property;" that he cut trees between the years 1820 and 1825.

Robert Wallace testified, that he was one of the part owners of the pre-emption on the N. W. fr. qr. sec. 35, T. 49, R. 17; that he had sold lots by their number, according to the plat, but did not recollect ever to have heard Hartt speak of town lots, as distinguished from the other land in Hannah Cole's pre-emption; but it was usually called, among the owners, "The Hannah Cole pre-emption;" that he came to Boonville in 1817; that Hartt, Carroll and himself never laid off any town lots on the land, nor did they ever offer any lots at public or private sale; the New Madrid claim was located in the name of Thomas Hupp; that he made a deed of release to Thomas Rogers, above mentioned, without any other consideration than to release any right he might have under the pre-emption, and to quiet his title under the New Madrid claim; that he had an interest of about one-sixteenth in the pre-emption.

Amongst others, the court gave the jury the following instruction: that, if the

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jury find that before the issuing of the execution against Hartt and Tennill, under which the sale to Adams was made, a portion of the quarter section of land in controversy, embracing lot No. 113, was, and had been, laid out into town lots, streets and alleys, for separate enjoyment by persons claiming the land adversely to Hartt, or those under whom Hartt claims, and that a plat of the lots, streets, and alleys had been, and was, deposited in the office of the clerk of the Circuit Court of Cooper county; and that afterwards, and before the issuing of the said execution in favor of Smith, Hartt, or those under whom Hartt claims, adopted such laying out of ground into town lots, streets and alleys, by conveying to others any of such lots so laid out, and describing the same in the deed of conveyance by reference to the plat, or by any other act; and further find, that the sheriff sold the whole quarter section in one lot to Adams, as alleged in Adams' deed; that such sale is void, and does not divest the plaintiff of his title created by the patent, unless the jury find, from the evidence, that Hartt desired the sheriff to sell the whole quarter section together.

The merits of the case will arise upon this instruction given by the court, at the instance of the plaintiff, Hartt. As much has been said in relation to the dedication of the streets and alleys on the N. W. qr. sec. 35, (the land in dispute), and as a contrariety of opinion is entertained as to the evidence of a dedication, we will bestow a little attention on that subject, although, in our opinion, it is beside the points on which this case must turn. One cannot but remark on the novelty of the position of the parties, in relation to this question. The owners of lots in a town or city are not contending with the original proprietors of the ground for the use of streets and alleys, which, they allege, has been granted to the public, but the proprietor himself is endeavoring to show, that he has made a dedication of streets and alleys for the benefit of others. If the owner of land had an intention or desire of making such a disposition of his property, it is strange that he should be at any difficulty in manifesting it, when he could so easily have placed the fact beyond all cavil or doubt. The doctrine seems well settled in America, that an owner of land may, without deed or writing, dedicate it to public uses. No particular form or ceremony is necessary in the dedication: all that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation. (6 Peters.) So it has been held, where the owner of land in a city sells building lots, bounding them by streets of a specified width, as laid down on a map, but not actually opened, the purchasers acquire a legal right, as against their grantor, to have the streets opened to the width delineated on the map, and the streets will be deemed to be dedicated to the public. (8 Wend. Rep.) Admitting the correctness of these principles — and they go the full length of the doctrine contended for by Hartt — will they warrant the instruction given by the court below? That instruction assumed, that Hartt adopted the plan of the town of Boonville, by conveying to others any of the lots designated on said plan, and describing the same in the deed of conveyance by reference to the plat: that is, if the jury found that he had conveyed a lot by reference to the plat of the town, then they ought to find, that he had made a dedication of the streets and alleys to the use of the public. Let it be borne in mind, that

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Hartt himself is endeavoring to show that he made a dedication, and is seeking to deprive another of his right in consequence of such an act. It was easy for him to have put this matter beyond all uncertainty. As he is attempting to obtain an advantage in consequence of having made a dedication, it will be no hardship to require of him ample proof of the fact, for it was in his power to make it. He is not to be allowed to adopt a mysterious course in the disposition of his property, and lie by and take advantage of errors which he has caused by his own conduct. As Hartt set up the pretension of a dedication, what rule or principle prevented the defendant from showing that no such dedication was made? If the public was interested in establishing the fact that these lots had been set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law would consider it in the nature of an *estoppel in pais*, which would preclude the original owner from revoking such dedication. (6 Peters' Rep.) All the principles contained in the books in reference to the dedication of private property for public use, have been maintained and adopted, and asserted in controversies in which others have been contending with the owner. It is a new doctrine that a party can, without authority of law, create an *estoppel* for himself, and be permitted to say he is *estopped* by his own act. It is for others to interpose the objection of an *estoppel*, and not for him who created it. If the jury had not been tied down by the instruction of the court, it is impossible to read the evidence preserved in the record, and entertain a moment's doubt but that they would have found a verdict, negating the fact that there had been any adoption by Hartt of the plat of the town of Boonville. The town was laid off by Morgan and Lucas, who claimed adversely to Hartt: afterwards, Hartt and others purchased a pre-emption from Hannah Cole, which covered part of the land laid off into lots. Hartt and his co-tenants, after acquiring the pre-emption, released their right and title to three lots on the town plat, and in the deeds described the lots by reference to the plat. This is all the evidence necessary for him, by the terms of the instruction, to introduce, in order to establish a dedication; and, opposed to this, we find Hartt claiming adversely to Morgan and Lucas, prohibiting the cutting of trees on the streets and alleys on various occasions, taking away wood cut by others, and when told it was on streets and alleys, saying, "It was immaterial — it was all private property." He never sold a lot, unless the three quit-claim deeds can be called such. May not the reference to the plat, in the quit-claim deeds, have been made simply to enable him to describe the lots, as otherwise it might have been a matter of difficulty to give them a sufficient designation? But if anything were wanting to show that Hartt never intended to adopt the plat of Morgan and Lucas, it is his failure or neglect to cause a map or plat of the town to be made out, acknowledged, certified and deposited with the recorder, in pursuance of an act concerning plats of towns and villages, approved 18th December, 1824. That act was retrospective; and, by the second section, required that in all cases where any town, or addition to any town, shall have been laid out within this State, previous to the taking effect thereof, the proprietor of such town should, within one year after the taking effect of said act, cause a map of such town to be acknowledged in the same manner as a deed for land, certified and deposited with the

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recorder of the county in which the town is situate, otherwise no lot could be sold, under a penalty of two hundred dollars. There were forty-eight lots on the tract of land in dispute: the title to one only of these lots had passed from Hartt, and that by one of the three quit-claim deeds before mentioned; and no plat was acknowledged and deposited with the recorder within the year prescribed by the said act, whereby Hartt was rendered incapable of selling a lot without incurring a penalty of two hundred dollars, a sum much greater than its value, if we may judge of the worth of such property from the evidence in the record. It is begging the question to say that the dedication had been made prior to the act of 1824, and therefore was not required to be acknowledged and deposited with the recorder.

Thus much as to the effect of the evidence of an adoption of the plan of the town by Hartt; but the admissibility of that evidence may be questioned.

On what principle is a party permitted to introduce his own acts as evidence for himself? We know the declarations or admissions of a party to the record, when against his interest, are sometimes admitted as evidence on his behalf, and so when they constitute a part of the *res gestæ*; but do these deeds, executed by Hartt, fall within either of these principles? Had this plat been acknowledged and deposited with the recorder, under the act of 1824, it would have been evidence of a dedication; but Hartt has not adopted that mode of evidencing his intention; and if he is now straitened to do it, it must be laid to his own neglect.

Let it be assumed that Hartt adopted the plat of the town which partially covered the quarter section in controversy; then it is contended by him, that the sale of the land in dispute, by the description of the N. W. fr. qr. sec. 35, T. 49, R. 17, is void, for uncertainty in the description of the property sold. Of the forty-eight lots laid off on the land, forty-seven were the property of Hartt, the only one disposed of being that before mentioned as conveyed to Rogers. So Hartt was the owner of the whole quarter section, with the exception of a single lot! On the other hand, it is contended, that the acknowledgment of a sheriff's deed is a judicial act, and is in the nature of a judgment of confirmation, which cures all defects in the mode of sale, which the court issuing the process had the power to remedy.

If the court has jurisdiction of the case, the parties, and power to order the sale by a writ, a sale so made and a deed acknowledged cannot be set aside in a collateral action. This principle has been maintained by courts, in States whose mode of disposing of a debtor's real estate is different from that adopted by our laws. (Baldwin's Rep., 272.) In Pennsylvania, where this doctrine obtains, the question raised by the defendant in error, in consequence of the mode of conducting sheriff's sales of real property, would rarely arise. The point is, that the sheriff's deed is void for uncertainty in the description of the estate sold, just as a common-law deed would be held void for uncertainty, in not describing with sufficient precision the thing conveyed. This illustration, however, is not intended to convey the impression that no more certainty of description is required in a sale and conveyance by a sheriff, of real property, than in the deed of an individual conveying his own estate: in these, the maxim prevails — "*Id certum est, quod certum reddi potest.*" Not so in sheriffs' sales. Where land is taken and sold by a sheriff ab-

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solutely, without any appraisalment or right of redemption in the debtor, the law, at least, has enjoined it on the officer that it shall be done in such a manner as to prevent sacrifices and speculation; hence our courts have adopted the rule, that in sheriffs' sales no land passes but what the creditor can enable him to describe with reasonable certainty: the land must be sufficiently designated or described. This was the principle of the case of *Evans vs. Ashley*, and was the principle of the various cases cited in the opinion delivered in that cause. In the controversy now under consideration, the sheriff sells a quarter section of land, as described on the public survey; about twenty-five acres of that tract is covered with the plat of a town; the defendant is the owner of the entire quarter section, with the exception of a lot ninety by one hundred and fifty feet; the streets and alleys are unopened, designated by no monuments, covered with brush and timber, with a single highway through it. Can the description of the sheriff be said not to be reasonably certain? In what respect is it uncertain? Do streets and alleys which have no existence in reality affect the description? or is it affected for the reason that there has been drawn on paper a plat of a town, which at some future day may be reared on the land? Does the fact, that a single lot is owned by another, make such a degree of uncertainty in the description as to render the sale void?—or is it to be held, that in a sale by a sheriff, of 152 acres of land, otherwise properly described, the circumstance that a half-acre of the tract is owned by another is to avoid a sale and conveyance for uncertainty in the description of the estate?—and because this is true, therefore the reverse of it is likewise so—that a sale of a lot containing a half-acre, by the description of a quarter section containing 152 acres, is likewise valid? Or will it be contended, that, in the case of *Roosevelt vs. Jackson*, (13 J. R.) if the sheriff had sold the Hardenburgh patent, instead of all the lands of Lawrence Van Kluch in that patent, that the former description would be sufficient to pass the lands of Van Kluch, but the latter would not? If the rule can be evaded in this way, it is not worth the breath that is spent in giving it utterance.

It is next objected by the defendant in error, that the whole quarter section, embracing as well the forty-eight town lots in which part of the tract was subdivided, as the residue of the quarter section, containing about 130 acres, was sold in mass, and not in separate parcels, and this is such a gross abuse of power on the part of the sheriff as does of itself, in point of law, annul the sales, no matter what may have been the intent of the sheriff or purchaser.

This position asserts the principle, that a sale in mass, by the sheriff, of real property, consisting of separate and distinct parcels, is absolutely void; or, in other words, that no title passes by a conveyance under such a sale, and the deed will be regarded as a nullity, under whatever circumstances it may be set up. The act concerning executions, (Rev. Code, 1825, sec. 13,) under which the sale in question took place, directs that in all cases where execution shall be levied upon any real estate, the sheriff or other officer levying the same shall divide such property, if susceptible of a division, and sell only so much thereof as will be sufficient to satisfy such execution, unless the defendant shall desire the whole of any tract or lot of land to be sold together, in which case it shall be sold accordingly.

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We regard this statute as directory. A violation of its injunctions will not make a sale void, although it may be good cause for setting it aside on proper application. A similar statute in New York has received a similar construction; (*Groff vs. Jones*, 6 Wend., 522;) an authority entitled to respect, not only from the acknowledged ability of her judges, but from the fact that her mode of conducting sales of real estate under execution conforms more nearly to ours than most of the States. In the case of *Hix vs. Perry*, 7 Mo. Rep., it was held, that the section of the statute above cited was designed to prevent a sheriff from selling more land than was necessary to satisfy an execution, and that it was not applicable to sales in which the whole tract was insufficient for that purpose. We are not to be understood as maintaining, that a sheriff in all cases, when the whole of a debtor's real estate was insufficient to satisfy an execution, would be upheld in selling it altogether. This is a matter about which it is impossible to prescribe any definite rule. Each case must be governed by its own circumstances. It is easy to state instances, at the mention of which every one would be startled, while others may be supposed which would meet with our approbation. The law has entrusted the officer with a discretion in conducting sales of land, and confides that he will exercise that discretion in a manner most beneficial to all concerned, reserving a power in the courts to control and correct that discretion, when it has been abused, by setting aside his sales. To establish it as an inflexible rule, that all sales of distinct parcels of real estate in mass would be void, and so regarded in all proceedings, would, in many instances, seriously prejudice the debtor, and, by destroying the confidence of the public in such auctions, would cause a sacrifice of property. Who would buy an estate at a sale conducted by an officer, if, at any distance of time thereafter, it might be declared void, on the ground that he had improperly exercised a discretion with which he was entrusted by law? Let it not be supposed that we entertain the opinion, that a sale cannot be set aside when an officer has been guilty of an abuse of discretion in making it. It would be a stain upon our jurisprudence if such a power did not exist in the courts. All that is intended to be said is, that a sale in mass by a sheriff, of distinct parcels of real estate, is not *ipso facto* void. None of the authorities cited by counsel maintain such a principle. The case of *Rowley vs. Brown* (1 Bin., 62.) was a direct application to the court to set aside a sale, on the ground, that the parcels of the property taken in execution were distinct, and should have been sold separately. The motion was sustained. The court said it was a rule to disallow, in every case, a lumping sale by the sheriff, where, from the distinctness of the items of property, he can make distinct sales. There may be exceptions, but the purchaser must bring himself within them. The case of *Tiernon vs. Wilson* (6 J. C. R.) was a bill in chancery, brought by the debtor against the sheriff and purchaser, to set aside a sale, where, on an execution for \$10 25, the sheriff sold two lots containing, together, 440 acres, a moiety of which belonged to the defendant, and was worth \$800, for the sum of \$13. The sale was set aside. The chancellor, in delivering his opinion, observed, it is difficult to define precisely the extent of property that a sheriff may sell together in mass. There must be a sound discretion exercised by the officer, and each case will furnish a rule applicable to it

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under all the circumstances. The point was made in the case of *Jackson vs. Newton*, but not determined by the court. This was an action of ejectment, brought by a purchaser under a sheriff's sale, against a tenant, who held adversely to the debtor. There was a sale by the sheriff of specific forms and lots of land together, and it was held, that a doubt could not be entertained, but that the court would have set it aside upon a direct application. Sales in mass, of real estate, held in several parcels, are not to be tolerated; they are oppressive and unnecessary, and deserve animadversion. So, in the case of *Nesbit vs. Dallam*, (7 Gill and Johns. Rep.,) the sale was set aside, because the sheriff had sold in mass divers lots of ground situated in the same town, but separate and distinct from each other. *On a motion to vacate it*, the court held such a sale was to be regarded as *prima facie* void, and he who seeks to sustain it must show its justice and expediency. This was a direct application to the court to set aside the sale. We subscribe to the principle to be extracted from these cases, that a sale in mass, by a sheriff, of distinct parcels of real estate, may be set aside on motion, or by a bill in chancery, and they, in our opinion, furnish no foundation for the contrary rule attempted to be set up, that such a sale is *ipso facto* void, and will be so regarded in a collateral proceeding. Were we without the experience of others to guide us to a correct conclusion on this subject, we must confess that the mildness and conservative tendency of the former rule, when contrasted with the harshness and severity of the latter, could not but win our approbation.

Judgment reversed, and cause remanded.

NAPTON, Judge, did not sit in this cause.

MOBERLY vs. PRESTON AND WIFE.

1. To publish falsely and maliciously of a woman that she "had a child," with the intention of charging her with having been guilty of fornication, is actionable under the act of January 14, 1835, "declaring certain words actionable."—Rev. Stat. 1835, p. 581.
2. A plea of justification in slander, that defendant, being asked by one B. of and concerning the words spoken and published, answered and declared that he had heard and been told the same by one S., is bad. It should have been averred that the defendant, at the time of speaking the words, gave the name of the author.—See *Church vs. Bridgman and Wife*, 6 Mo. Rep., 190.
3. In a plea of justification in slander that the words are communicated to defendant by a third person, and that he gave the name of his author at the time of speaking the words, the defendant should give a cause of action against such third person by showing that he spoke the words falsely and maliciously, and that defendant believed what he heard, and repeated the words on a justifiable occasion.
4. In an action of slander, for charging plaintiff with having been guilty of fornication, evidence that there was "a common report in circulation," concerning the guilt of the plaintiff, is inadmissible. Neither can the defendant prove that a third person told him of the report before the time he was charged with speaking the words.

ERROR to Livingston Circuit Court.

CLARK, for Plaintiff in Error.

1. The declaration is defective. There is no cause of action sufficiently set out. The inuendo attached to each count does not help it, there being no sufficient colloquium, or previous statement.—4 Mo. Rep., *Dyer vs. Morris*, 214.

2. The Circuit Court clearly erred in sustaining the objections to the questions propounded to the witnesses, Bridgman and Hendricks. It is competent for a defendant in slander, upon a plea of not guilty, to prove in mitigation of damages that the slanderous words were first spoken by others. In this case there was not only issue taken upon the plea of not guilty, but upon a special plea in justification, alleging that the defendant only repeated what had been told him by another.—6 Mo. Rep., 190, *Church vs. Bridgman and Wife*, and the authorities there cited; 1 Binney, 89–92, *Kennedy vs. Gregory*, and *Morris vs. Duane*; 9 Porter's Ala. Rep., 139, *Arlington vs. Jones*.

3. The words as set out in the declaration are not very clearly proved, and if proved at all, it is by witnesses who are entitled to but little credit, as their manner of testifying shows. The whole evidence, considered together, also shows that the defendant was not actuated by malice, or at least such malice as warranted the damages assessed by the jury.—*Berry vs. Dryden*, 346, 7 Mo. Rep.

4. It is contended, that the truth of the defendant's special plea was substantially made out by evidence, and that the verdict ought to have been for him.

It is therefore insisted, that the Circuit Court erred, first, in not arresting the judgment, and secondly, in not granting a new trial.

STRINGFELLOW, for Defendant in Error.

1. The demurrer to first and third special pleas was properly sustained. 1st:—In this plea the exact words of the third person must be given:—they must be alleged to have been spoken *falsely and maliciously*, and that defendant believed them when he repeated them, and that he repeated them on a justifiable occasion.—*Chitty's Plead.*, vol. 1, p. 532, and note, 911, *ibid.*; *Church vs. Bridgman and Wife*, (as to *quo animo*), 6 Mo. Dig., 193. All these requisites are wanting in those pleas.

2. The verdict was not against evidence. The words laid were substantially proved. It is only necessary to prove so many of the words laid as import a charge of fornication.

3. The special plea of defendant was not sustained by the evidence.

4. The damages were not excessive; but were too little.

5. The questions propounded to Lucretia Bridgman and Betsy Hendricks ought to have been, and were, properly rejected.—*Anthony vs. Stephens*, 1 Mo. Dig., 181; *Church vs. Bridgman and Wife*, 6 Mo. Dig., 193.

7. The declaration is not defective; but contains all the necessary averments.

Moberly vs. Preston and Wife.

TOMPKINS J., *delivered the opinion of the Court.*

Francis Preston, and Zera, his wife, brought their action, for words spoken, against William Moberly, in the Circuit Court of Livingston county, and there obtained a judgment, to reverse which he prosecutes this writ of error.

There are three counts in the declaration. In the first count it is charged, that the defendant, in a conversation held about Zera Preston, while she was sole and unmarried, spoke, of and concerning her, these words: "Mrs. Preston had a child in Kentucky;" meaning that she was guilty of fornication.

In the second count, after a like colloquium, and allegation of several persons being present, the words charged are, "Preston's wife had a child in Kentucky, before she came to this country;" meaning that she had been guilty of fornication.

The third count, after the proper colloquium, charges these words to have been spoken: "Frank Preston's wife had a bastard child while in Kentucky, before she came to this country." In all of these counts there are proper averments that the words were spoken of and concerning Zera Preston, one of the plaintiffs.

To this declaration, the defendant filed, 1st, the general issue; 2d, three special pleas of justification. Demurrers were sustained to the first and third special pleas, and issues being joined on the first plea pleaded, and an issue being made on the second special plea, the parties went to trial. The plaintiff had a verdict and judgment for \$1300. The defendant moved in arrest of judgment, and for a new trial.

It is actionable to publish, maliciously and falsely, in any manner whatsoever, that any person has been guilty of fornication or adultery.—See the act declaring certain words actionable, p. 581 of the Digest of 1835, title, "Slander."

In each of the three counts the falsehood and malice is charged in the very words of the statute; and from the words charged to have been spoken in reference to the colloquium, the guilt of fornication arises. Each count would have been good on demurrer. It is, then, good on a motion to arrest the judgment, since many defects, that might have been taken advantage of on demurrer, are cured by verdict.—Digest of 1835, p. 468, sec 7.

It was also urged in arrest, that the demurrers of the plaintiff to the first and third pleas were wrongly sustained,

The defendant, in the first special plea, alleges, that, at the time of speaking and publishing the said several words in the said declaration mentioned, being then and there interrogated, and asked by Lucretia Bridgman, &c., of and concerning the words spoken and published, he then and there answered and declared, &c., that he had heard and been told the same from and by Sarah Cox, &c. This plea is evidently bad. It should have been alleged and proved, that, at the time of speaking the words in the declaration charged, the defendant gave the name of the author.—*Church vs. Bridgman and Wife*, 6 Mo. Rep., p. 193.

The third special plea runs thus: that the said plaintiffs ought not to have or maintain their said action thereof against him, because, he says, that before the speaking of the words charged in the declaration, the defendant had been told by one Sally Cox, &c., that the said Zera Preston had a child in Kentucky before she came

to this country, (thereby then and there meaning that she had been guilty of fornication;") and he then alleges, that, at the time of speaking the words in the declaration charged, he, the said defendant, declared, in the presence and hearing of all to whom he spoke these words, to wit, &c., that he had heard, and been told the same by said Sally Cox, and that he repeated the same with no evil intent.

In Chitty's Pleadings, p. 532, it is said, that a plea of justification of this kind should give a cause of action against the person whom the defendant gives as his author, by showing that the informant spoke the words falsely and maliciously, and that the defendant believed what he heard, and repeated the words on a justifiable occasion. Chitty refers to *McPherson vs. Daniels*, 10 B. & C., 263, viz.: 21 Com. Law Rep., 71. In that case, Judge Bayley says, "The charge in the declaration is, that the defendant falsely and maliciously spoke and published, in the presence and hearing of other persons, of and concerning the plaintiff, and of and concerning him in his business or trade of a coach-proprietor, these false and malicious words: His horses have been seized from the coach on the coach-road; he has been arrested, and the bailiffs are in his house, thereby meaning and intending that the plaintiff was in bad circumstances, and was incapable of paying his debts. Now, that imports an unqualified assertion to have been made by the defendant, and if he had pleaded the general issue only, it would have been incumbent on the plaintiff to have proved, at the trial, an unqualified assertion by the defendant to that effect; and if, instead of proving an unqualified assertion by the defendant, he had proved only that the defendant had said that Worr had told him that the plaintiff had been arrested, &c., the defendant would have been entitled to a verdict. He was bound, therefore, according to the first principles of pleading, to confess the charge he professed to answer, and then to aver some matter as an answer. The charge is, that the defendant made an unqualified assertion that the plaintiff had been arrested, &c.: unless the plea, therefore, contain an admission by the defendant, that he spoke the words having that unqualified sense, it is bad. The plea does not admit that he spoke the words in an unqualified sense; it is, therefore, bad, because it does not confess the charge stated in the declaration. Another objection pointed out by my brother, Parke, is, that the plea gives the plaintiffs no cause of action whatever against Worr, and that, according to Lord Northampton's case, (12 Cooke, 124,) a person, to justify the repetition of slander must give the person slandered a cause of action against the other. Now, here the plea merely states that the words were spoken by Worr, without adding, that they were spoken falsely and maliciously. They might have been spoken by Worr upon a justifiable occasion, as by way of confidential communication to a creditor, or in a court of justice. Worr may have been examined in a court of justice, and the words may have been extracted from him on cross-examination. Assuming, therefore, that the defendant might rely on the fact of his having heard the words first spoken by Worr, and of his having named it at the time as an answer to this action, still he ought to have shown, by his plea, that the words were spoken by Worr under circumstances which did not justify the speaking of them."

Apply what is above said to the special plea in this case. Moberly does not admit that he spoke these words as charged in the declaration. The words which

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he avers in this plea, that he heard spoken by Sally Cox, are—"Zera Preston had a child in Kentucky before she came to this country." The record shows that Zera Preston is the wife of Francis Preston, and for anything here shown, she might have borne this child in lawful wedlock; the intelligence might have been communicated, in friendly conversation, held by Sally Cox with a newly-formed acquaintance of Zera Preston. This third special plea is certainly bad.

A motion was also made for a new trial; but as no instructions were asked, the judgment of the Circuit Court cannot be reversed but for very obvious reasons. The reasons for a new trial are—

1. Because the evidence does not support the declaration.
2. Because the words charged in the declaration were not proved.
3. Because the court refused to admit proper and legal testimony offered on the part of the defendant.

It is obvious that where any testimony has been given in such an action, it is the province of the jury to decide whether the evidence supports the declaration, or whether the words charged in the declaration were proved.

To me it appears, that an abundance of evidence was given to justify a jury in the two findings, even if instructions had been asked; but as none were asked, I shall not consume time in the inquiry.

But it was one reason assigned for a new trial, that evidence of the defendant ought to have been admitted which had been excluded. Lucretia Bridgman was asked whether there was a common report in circulation about Mrs. Preston having a child. Betsy Hendricks was asked to state whether she ever told the defendant of the report before the time he was charged with speaking the slanderous words in the declaration mentioned, and to state what she told him. The court suffered neither of these questions to be answered. Amongst other cases cited by the counsel for the defendant, to show the court committed error in overruling this question, is *Church vs. Bridgman and Wife*, where it is said that it is no justification, nor even mitigation of damages, for the defendant to prove on the trial that others had spoken the slanderous words. (6 Mo. Rep., 190; and *Anthony vs. Stevens*, 1 *Ibid.*, 254.) The defendant is not more fortunate in two other cases cited, (1 Binney, 89-92, *Kennedy vs. Gregory*, and *Morris vs. Duane*.) I should have cited this case for the plaintiff, *Preston: Arrington vs. James*, 9 Alabama Reports, 139, is not in point.

The judgment of the Circuit Court must be affirmed.

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1. In declaring on a written instrument the plaintiff must set out the legal effect of the instrument. It will not be sufficient for the plaintiff to state that the defendant made his certain writing obligatory, &c., and then set out a copy of the instrument, without stating that the same was made to the plaintiff.
2. A party cannot, in the same declaration, declare on two contracts, one made by all the defendants, and the other by one only of the defendants.
3. M., one of the defendants, contracted with the county of Platte to cover the court-house of said county with tin, the work to be done with good tin, and in the best manner, &c., for which M. was to receive \$753. M., with the other defendants as his securities, entered into bond to the county for the faithful performance of the work in the sum of \$1,570, "*not as a penalty, but as liquidated damages*." The court held that the sum mentioned in the bond, viz., \$1,570, was to be considered as a penalty, and not as liquidated damages.

APPEAL from Platte Circuit Court.

HAYDEN, for Appellants.

1. The declaration is radically defective, and shows no cause of action against the defendants. The bond sued on is not stated in the declaration to have been made to the plaintiff, or to any one acting as her agent, authorized to receive it for her, and therefore it does not appear that the supposed breaches of the condition of the bond could, or did, deprive her of anything to which she had title or right. — *Perkins vs. Reed*, administrator of Nash, &c., 8 Mo. Rep., 33; 6 *Ibid.*, 277, *Muldron vs. Tappin*, and authorities cited.

2. The demurrer of the plaintiff to the pleas of the defendants was improperly sustained by the court; and as the declaration is defective, the judgment thereon ought to have been rendered for defendants: and, aside from the defect in the declaration, the said several special pleas respectively show a good bar to the plaintiff's right of recovery.

3. The court erred in permitting plaintiff to enter a discontinuance of his action as to defendant, John P. Hunt, after plea plead by him. — 1 Chitty, 599, title, "Pleas in bar by several defendants."

4. The court erred in permitting the plaintiff to give to the jury irrelevant and incompetent testimony, and testimony variant from the contract declared on; and erred in refusing to permit the defendants to give the evidence proposed by them upon the trial.

5. The court gave to the jury, upon the motion of plaintiff, instructions against law, and erred in refusing to give to the jury the instructions asked by defendants.

The first instruction given to the jury, at the instance of plaintiff, was erroneous — because, although the jury might have found the deed read in evidence to be the deed of the defendants, yet it did not thence follow that they were bound to find for the plaintiff. The deed read in evidence by the plaintiff is variant from

the one described in the declaration, and the jury had a right to determine the question how far the deed read in evidence, though found to be the deed of the parties, corresponded with the one set out in the declaration.

The second instruction given for the plaintiff to the jury is erroneous in this: it requires the jury to find a verdict for the sum of fifteen hundred and seventy dollars in damages, as being stipulated damages; whereas, upon a fair and legal construction of the contract, the same can only be considered in the nature of a penalty, designed and intended by the parties to secure the performance of certain work to be done by defendants. Whether a sum of money be intended as a penalty, when mentioned in agreements, to secure the performance of contracts, or other particular duties, or whether intended by the parties as *stipulated damages*, to be paid in lieu and in satisfaction of a thing agreed to be done or performed, must always depend upon the nature and object of the contract—taking into consideration the comparative value of the collateral thing or duty to be performed, with the amount of the sum named as a penalty, or as damages, stipulated to be paid in lieu of the thing or duty contracted. If the collateral thing or duty covenanted to be performed, or done, be so much less valuable than the sum named as the penalty or stipulated damages, as would present a case of such excess over what would be legally right for the obligee to recover, in a suit for damages against the obligor, for a breach of his covenant for the performance of the thing or duty—whether the same be named as a penalty or as stipulated damages in the contract—as would induce a court to set aside a verdict, if found in damages for such breach of covenant, the law will, and ought, to consider the same as a penalty, and not as stipulated damages. In this case the value of the collateral duty to be performed, according to the stipulated price to be paid as an equivalent, is the sum of \$788. The work is admitted by plaintiff to have been performed by William Moore; and yet, because not quite so well done as by covenant required, the plaintiff demands, and recovered judgment for *double the value* of the work, as *priced* by the parties in the contract, and is in possession and full enjoyment of the work as *done* by defendant, Moore.—5 Cowen, 150, note *b*; 3 Johns. Cases, 297, Dennis vs. Cummins; 7 Johns. Rep., 72; Chitty on Contracts, 5th Amer. edit. from the 3d Lon. edit., corrected by Thompson, pp. 863–6, and authorities referred to; 3 Peters' Dig., 206, 207; 5 Cond. U. S. Rep., 210; Taylor vs. Standiford, 7 Wheaton, 13, same case; Digest of 1835, sec. 5–8, p. 431.

And the criterion of damages laid down in said second instruction, given at the instance of the plaintiff, is erroneous for another insuperable reason, to wit—the bond is a statutory bond, and is not warranted by the statute under which it was made: it was made by defendants to the county of Platte, under the provisions of the statute of this State, (title, "County Buildings," p. 148 of Digest, 1835,) by which said County Court was authorized to contract for the covering of the courthouse, and to require of the undertaker, Moore, bond, with security, in a *penalty* in double the amount of the price agreed to be paid for the doing of the work; but she had no right, power, or authority to demand or require by the contract, by way of stipulated damages, a large sum of money in lieu of the roof. She had no authority under the statute to fill her coffers, by way of speculation, out of the

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pockets of the undertaker of her public buildings: she was, and is, limited by the statute to the right only of securing the performance of the thing contracted for by the penalty presented in the act; and in case of a non-compliance with the contract, to such damages for the breach of it as the actual damages sustained, and nothing more; and for anything further, the bond is void. — 1 Peters' Dig. U. S. Decisions, sec. 37, p. 374; *Armstrong vs. The United States*, Peters' Cir. Ct. Rep., 135; 1 Peters' Dig., sec. 49, p. 375; 4 Wash. Cir. Rep., 620, *United States vs. Samuel and J. L. Howell*.

LEONARD and BAY, for Appellee.

1. The breaches are properly assigned: the defendant, Moore, contracted to perform the work in the best manner, and with good materials, &c.; and the breach assigned is, that the work was not done in the "best manner," &c., but in an unworkmanlike manner, &c., and stating how the plaintiff was injured thereby. Besides, any defect or inaccuracy in assigning the breach is aided after verdict; for the court will intend, that damages could not have been given if a good breach had not been shown. — *Thomas vs. Roosa*, 7 Johns. Rep., 461; *White vs. Derrilt*, 2 Hall, 405; *Helm vs. Wilson*, 4 Mo. Rep., 493.

2. The second, third, fourth and fifth pleas are bad, because —

1st: The second and third pleas are no answer to the breaches assigned. The question is not whether the defendant, Moore, performed the work, but whether he performed the same in the manner required by the terms of his contract. — 1 Chitty's Plead., 553, 554.

2d: The third plea tenders an immaterial issue.

3d: The fourth plea refers to the jury a matter of law. — 1 Chitty's Plead., 245; *Bennett vs. Martin*, 6 Mo. Rep., 460.

3. The evidence of Jesse Morin was properly admitted, because —

1st: He had no interest in the event of the suit.

2d: His evidence was not admitted for the purpose of varying or changing the terms of a written agreement, but for the purpose of showing that a pretended written agreement was not, in fact, the agreement of the parties; that no such agreement was made. — Chitty on Contracts, 90, 91; 3 Starkie's Ev., 1015.

4. The instructions asked by the defendants were wholly irrelevant to the issue.

Where issue is joined on the plea of *non est factum*, the only proof required on the part of the plaintiff is proof of the execution of the bond by the defendant. (*Hutchinson vs. Kearns*, 1 Selwyns' N. P., 589.) But in the case at bar, even this proof was not required; the plea was filed without affidavit, which dispenses with proof of the execution of the bond. — Rev. Stat., 1835, p. 463, title, "Practice at Law," 18th section of 4th article.

5. Where parties agree that a certain sum shall be paid, "*not as a penalty, but as liquidated damages*," for the non-performance of a particular act, in regard to which damages, in their nature uncertain, may arise, such sum may, in case of default, be recovered as liquidated damages. (4 Burr., 222, 225; 3 Taunt., 469.) See *Kemble vs. Farren*, 6 Bing., 141, in which it is admitted, that there is "nothing illegal

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or unreasonable in the parties, by their mutual agreement, settling the amount of damages, *uncertain in their nature*, at any sum upon which they may agree."—*Fletcher vs. Dyche*, 2 T. Rep., 32; *Barton vs. Glover*, 1 Holt, 43; *Glasson vs. Beadle*, 7 J. Rep., 72; *Hosbrouch vs. Tappan*, 15 J. Rep., 200; *Dakin vs. Williams*, 17 Wend., 447.

In *Irvin's Administrator vs. Tanner*, 1 Mo. Rep., 149, (210) it was held, that where the parties had fixed their own measure of damages, the court would not interfere with their intention.

In *Reilly vs. Jones*, 1 Bing., 302, (8 English Com. Law Rep., 328,) Burrough, judge, remarked, "there is no case which has decided that the defendant shall not pay the whole sum, when the expression, *liquidated damages*, has been employed to designate the nature of the payment."

TOMPKINS, J., delivered the opinion of the Court.

On the 29th day of September, Platte county instituted an action of debt against William Moore, David Hunt and John P. Hunt, in the Circuit court of that county, and obtained a judgment, to reverse which, this appeal is prosecuted.

The first count in the declaration is in these words: "Platte county complains of William Moore, David Hunt and John P. Hunt, of a plea that they render to the said plaintiff the sum of \$1,570, &c., which they owe to, and unjustly detain from, her: for that whereas the said defendants heretofore, to wit, on the 12th of June, in the year 1840, at, &c., made their certain writing obligatory, sealed with their seal, and to the court here shown, the date whereof is the day and year aforesaid, and which said writing obligatory is in the words and figures following, to wit: 'Know all men, by these presents, that we, William Moore as principal, and David Hunt and John P. Hunt, as securities, are held and firmly bound unto the county of Platte in the sum of \$1,570, not as a penalty, but as liquidated damages, to the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated the 12th day of June, 1840.

"The condition of the above obligation is such, that whereas the above bound William Moore has this day contracted with Jesse Morin, Elijah Moore, and Demetrius A. Sutton, superintendents of the court-house in Platte City, for covering said court-house, which said covering is to be completed by the first day of June, 1842, in the following manner, to wit:—The tinning of the roof to be done with good tin, in the following manner: all necessary covering and securing of cornice to roof and cupola, and down to cupola to be completed: for which the said superintendents, in their official capacity, agree to pay the said Wm. Moore the sum of \$758, in any money which is current in the country; one-half of which is to be paid when the work is half done, the balance when completed and received by the superintendents. Now, if the said William Moore shall well and truly complete the contract as above specified, then the above obligation to be void; otherwise, to remain in full force and virtue.'" (*Signed, as above, by the obligors.*)

Then the breach is assigned, that the said William Moore did not do the tinning of the said roof in the best manner, but on the contrary thereof, &c.

The second count is as follows:—"And whereas, also, the said defendants afterwards, to wit, on the said twelfth day of June, in the said year 1840, at the county of Platte aforesaid, by their certain other writing obligatory, sealed with their seals, and here to the court shown, the date whereof is the day and year last aforesaid, acknowledged to be held and firmly bound to the plaintiff in the sum of \$1,570, not as a penalty, but as liquidated damages to be paid by the said defendants to the said plaintiff, upon the failure of the said William Moore to comply with certain conditions in said writing obligatory mentioned, among which conditions in said writing obligatory is this, that the said William Moore should cover the court-house in Platte City with good tin in the best manner; and the said plaintiff saith, that the said plaintiff caused the said roof of the said court-house to be framed and prepared for the reception of the tin in a reasonable time, to wit, on and by the first day of August, in the year 1841, at the county of Platte aforesaid, of which the said defendants then and there had notice, and the said plaintiff, in fact, saith that the said William Moore did not do the said tinning of the said court-house in the best manner, but, on the contrary thereof, did the same in a manner so bad and so unworkmanlike, that, &c., by means of which said last-mentioned breach the said last-mentioned writing obligatory became forfeited, &c."

The defendants then craveoyer, and set out the bond of William Moore, David Hunt, and John P. Hunt, as it is set out in the first count in this declaration; after this bond so set out, follows another writing, signed by William Moore, in the words following, to wit:—"It is further understood, that the covering of the main body of the building is to be completed so soon as practicable after the roof is framed and prepared by the carpenters for the reception of the tin, anything in the foregoing bond to the contrary notwithstanding. This day and year aforesaid,

(Signed) "WILLIAM MOORE." [Seal.]

To this declaration, consisting of two counts, the defendants pleaded, and on the issues made a verdict was found for the plaintiff, and judgment was entered up accordingly for the sum of \$1,570, the stipulated damages. The defendants moved for a new trial, and in arrest of judgment. Both of these motions were overruled.

Two questions arise here, one of which it is necessary to decide now, and the other, if not now necessary to be decided, it may hereafter become necessary to decide.

1. Ought this judgment to have been arrested?

2. Is the sum of \$1,570, in the declaration mentioned, to be considered as a penalty, or as liquidated damages?

The first count in this declaration is worth nothing; its commencement is formal enough, but when we come to the statement of the cause of action, we find nothing more than that the defendant made his certain writing obligatory, of which writing a copy is then given. In the statement of the cause of action, it is expected that the plaintiff will set out the legal effect of the instrument of writing declared on; as, for instance, in the present case, that the defendants, by their

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writing obligatory, bound themselves to pay, &c., to the plaintiff, on the condition therein mentioned. See the case of *Perkins vs. Reed*, administrator of Nash, decided at the July term of this Court for the last year; see, also, the case of *Muldrow vs. Tappin*, 6 vol. Mo. Decisions, p. 267, in which last case the opinion was delivered by the late Judge McGirk, and he there cites several authorities. The best authority, however, for such pleaders is the form of a declaration in debt from Chitty.

But the second count of this declaration is more glaringly defective, if possible, than the first; oyer is given of two instruments of writing, the one under seal, executed by three parties, to wit, William Moore, David Hunt, and John P. Hunt, the other not under seal, and executed by William Moore alone; it has a scrawl at the end of the name of William Moore, by way of seal, but that is not so declared or stated in the instrument of writing; but it is immaterial whether this latter instrument be under seal or not, for it is certain the plaintiff cannot, in the same count, or even in the same declaration having different counts, declare on two contracts, the one of which is made by three men, and the other by one of those three.

The action upon an express contract, whether it be by deed or merely in writing, or by parol, must in general be brought against the party who made it, either in person or by agent. (1 Chitty's Plead., 86.) Let it be granted that the latter writing, of which oyer is craved and given, is an amendment of, or an addition to, the first, it is still very evident Moore is not able to alter, or change in any manner the contract made with Platte county by himself and David Hunt and John P. Hunt, his two securities in the said bond. By the terms of the bond the court-house was to be covered by the first day of June, 1842; and by the terms of the addition made to the bond of the principal and security, by Moore alone, the principal, the completion of the covering of the building is required to take place as soon as possible after the roof is framed and prepared by the carpenters for the reception of the tin: and in this second count it is averred, that "the said plaintiff caused the roof of the said court-house to be framed and prepared for the reception of the tin in a reasonable time, to wit, on and by the first day of August, 1841," and that the defendant had notice thereof. Whether this change be for the benefit of the plaintiff or the defendant does not appear on this record, nor is it material for the present purpose; suffice it to say, that it is a change, and a material change, and a change made without the consent of the security. This second count of the declaration is framed, then, on two contracts, the one made betwixt the county of Platte, plaintiff in this action, and the three defendants; the other made betwixt the said county of Platte, plaintiff, and one of those defendants, William Moore, without the concurrence of his two securities. This is so glaringly wrong, that it is useless to comment on it: the first count, then, is a nullity; it is just as if the plaintiff had filed the defendant's bond in the clerk's office, and ordered a writ to be issued thereon, and proceeded to trial on such bond and writ. The second is still worse: the two securities of Moore being sued on a bond which the record shows they did not make. Moreover, pleas were filed to this declaration, which were demurred to by the plaintiff, and the demurrers sustained by the Circuit Court.

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These demurrers also refer back to the declaration, and enable the Court now to inquire into its sufficiency. The judgment must be arrested.

2. Whether this sum of \$1,570 mentioned is to be regarded as a penalty, or as liquidated damages, is not so easily to be decided as the first point made here. The books furnish no very certain rule, (see Chitty on Contracts, p. 863 to 866,) and whether the parties call it a penalty or liquidated damages does not seem to have much influence with the courts in ascertaining the intentions of the parties as expressed in the contract. The courts seem rather to lean against construing agreements so as to compel the parties to pay the sum as stipulated damages, and are rather disposed to regard the sum of money agreed to be paid as a penalty to enforce the performance of the contract. In this case the contract was to cover the court-house by the first day of June, 1842, with good tin, in the best manner, all necessary covering and securing of cornice to roof and cupola, and dome of cupola to be completed. This, then, is a building contract to do several things in a special manner, and in a given time. It can hardly be imagined that it was intended that the defendants were expected to pay \$1,570 if they failed to finish this work on the exact day; for example, if they failed by one, or even two days, or if there were only a slight neglect in the execution of a particular part of the work. This Court, as at present advised, is disposed to regard the sum of \$1,570 in the declaration mentioned as a penalty.

The judgment of the Circuit Court is reversed, and the cause remanded.

PAYNE & RIGGIN vs. ST. LOUIS COUNTY.

The Court adhere to the decision made in *Maupin vs. Parker*, (3 Mo. Rep., 219, 2d edit.,) viz., that the acts of the General Assembly providing for the sale of the township school lands are not repugnant to the nature of the grant, and do not conflict with any provision of the constitution of Missouri.

The General Assembly having power to provide for the sale of these lands, for the use of schools, a purchaser under the law authorizing the sale of school lands acquires a valid title to the same.

ERROR to St. Louis Court of Common Pleas.

GEYER, for Plaintiff in Error.

1. The land was granted to the State, for the use of the inhabitants of the township, for the use of schools. (Act of Congress, 6th March, 1820, sec. 1, clause 1, and ordinance.) The State thus became a trustee, and could not relieve itself of the trust by any act of its own.

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2. The trust is perpetual — the use to the inhabitants of the township — not at any particular period, but at all times, the future as well as the present.

3. There being in the contract by which the trust was created no express power for the purpose, the State cannot alter the nature of the trust property. (1 Saunders, 364; 2 Fonblanque, 167.) A trustee cannot, where land is the subject of the trust, convert that land into money.—Weller vs. Witter, 3 Williams, 99; Wilner vs. Harewood, 18 Ves., 274.

4. Although the legislature may provide for the disposition of property of which the State is absolute owner, it cannot impair, or change the obligation of a contract of the State, nor change the relation created, or duties assumed, by a contract entered into by the convention, of equal obligation with the constitution.

5. The legislature possesses no power over private property, so as to vary the right of succession to such property, where the trustee is an individual, and its power is not enlarged by the fact that the State is the trustee in virtue of a compact of paramount obligation.

6. It may be conceded, that under peculiar circumstances, and where it is *evidently* for the benefit of the trust estate, and of the parties in interest, a court of chancery may authorize a conversion of land into money, and money into land, but this power cannot be exercised by the legislature.

7. The convention not only bound the State by compact, in reference to the school lands, but by the 6th art., sec. 1, the whole power and duty of the general assembly over the trust property is defined. It is to take measures to *preserve it from waste or damage*, and apply the funds which may arise from such lands in strict conformity to the object of the grant.

In the case of Maupin vs. Parker, (3 Mo. Rep., 310,) this Court held that the legislature was competent to authorize the sale of the absolute estate in the school lands; but it is believed that the principles recognized in that case did not authorize the conclusion, and it is respectfully submitted that the opinion in that case ought to be re-considered.

In that case it agreed, that if a grant were made to A. to the use of B., A. could not alienate the land; and I apprehend that the State, as trustee, has no larger power over the estate of its *cestui que trust*, than A. would have in the case supposed.

The court says the State has the same jurisdiction over the land that she has over the real property of any individual within the limits.

This proposition is not controverted; she undoubtedly has the same legislative power over the property of her *cestui que trust* as she would have over that of the *cestui qui trust* of A., and no more.

Now, in case of a grant to A. to the use of B., A. cannot, by virtue of the contract to which he is a party, convey the absolute estate; can the legislature enable him by law, enacted after the creation of the trust, to convey the estate? would it not impair the obligation of a contract?

It is true, as stated in the opinion, that the United States have divested themselves of their right of control over those lands, *with the express pledge of the State*, that the inhabitants of each township should be permitted to enjoy the same, for

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the use of schools; but it does not follow that the legislature can alter the nature of the trust property, or discharge the State of the trust.

ALLEN, *for Defendant in Error.*

The defendant in error insists that the issues were correctly found. As to the first, there is no evidence disproving the execution of the bond sued on.

As to the second, there was no fraud shown as to the execution of the bond.—*Alter et al. vs. Burrows and Jennings*, 7 Mo. Rep., 424.

As to the third, fourth, fifth and sixth, the court is referred to the evidence, the following authorities, and the principle, "*Stare Decisis*."—Constitution of Missouri, art. 6; act of Congress, 6th March, 1820; acts of Assembly, 6th December, 1820, 21st January, 1829, 11th February, 1833, 14th January, 1837. These refer to leasing:—Acts of Assembly, 17th January, 1831, 28th January, 1833, 19th March, 1835, 25th February, 1835, 25th January, 1839, 8th February, 1839, 9th February, 1839, 23d February, 1843. Session acts of 1842–3 are full of laws authorizing sale of school lands: 3d Mo. Rep., 310, *Maupin vs. Parker*—decided, Fayette District, April term, 1834; 1 Kent's Commentaries, 477; 2 Scamman's Rep., 57, 568.

The defendant in error also insists that the petition of the county of St. Louis is sufficient, and that the action of petition in debt is properly maintainable in this case.—Rev. Code of 1835, 449, 142; 2 Scamman's Rep., 314.

NAPTON, *Judge, delivered the opinion of the Court.*

This was an action of petition in debt, upon a bond given by the plaintiffs in error to the county of St. Louis, for the use of the inhabitants of township 47, range 5 East. The defendants pleaded, first, the general issue; second, that the bond was obtained by fraud; third, that the bond was executed without any consideration; fourth, that the bond was executed in consideration of a sale made by the sheriff of St. Louis county, to the defendant, Payne, of land in said county, at public auction, by virtue of an order of the County Court, and that said county had not, at the time of making said order, or since, any right, title, interest, or estate, in said land, nor had said Court any authority, or lawful jurisdiction to order said sale; wherefore said bond is void, &c. Fifth plea is the same. The sixth plea avers, that said bond was obtained in consideration of the sale of lands, made by the sheriff of St. Louis county to the defendant, Payne, and for no other cause or consideration whatever; which said land, at the time of said sale, was, and is, the property of the State of Missouri, for the use of the inhabitants of township No. 47, range 5 East, for the use of schools, and the said sale was made by said sheriff, without any lawful authority whatever; Wherefore, &c.

To these pleas, suitable replications were filed, and the matters in issue were submitted to the court, upon a case agreed, which is, in substance, as follows:—

At the May term, 1838, of the St. Louis County Court, the said court made an order, upon the petition of sundry white householders of Congressional township

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44 north, range 5 East, praying for the sale of school lands in said township, and, upon being satisfied that a majority of the householders residing within said township had signed said petition, directed the sheriff to expose to sale said lands, after giving sixty days' notice, by advertisement, duly and legally put up, in the manner and upon the terms directed by law. Pursuant to said order, the sheriff did advertise, according to law; the lands were sold at the time and place specified in the advertisement, and Thomas J. Payne, one of said defendants, became the purchaser of sundry parcels of said section, for which the sheriff gave him a certificate of purchase. At the same time, said Payne executed his bond to the county of St. Louis for the purchase money, which is the same set out in the petition. If, upon said case, the court should be of opinion that the plaintiff should recover, the issue to be found accordingly; but if, on the contrary, that the plaintiff should not recover, then, that a judgment of non-suit be entered.

The court, being of opinion that the plaintiff was entitled to recover, found the issue accordingly, and to reverse this judgment, this writ of error is brought.

The question presented by the record is the same which this Court decided in the case of *Maupin vs. Parker*, 3 Mo. Rep. The first act of the legislature, authorizing the sale of the sixteenth section, was passed January 17th, 1831. The decision of the court, sustaining the validity of the law, was made in 1834, since which several other acts have passed, substantially like the act of 1831, though modified in details.

In the celebrated case of *McMulloch vs. The State of Maryland*, (4 Whea. Rep., 316,) Chief Justice Marshall declared, that an exposition of the constitution deliberately established by *legislative* acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded. If this be true in relation to the exercise of the delicate power incident to courts, of reviewing the acts of a co-ordinate branch of the government, how much more forcible does the remark apply to a case where *all* the departments, legislative, executive, and judicial, have deliberately given sanction to the law. Thirteen years have elapsed since the passage of the first act on this subject; that act was pronounced constitutional, and successive enactments, recognizing the same principle, indicate an acquiescence on the part of the legislature and the people. Property, to a large amount, has been invested on the faith of these acts. Under this state of legislative action and judicial decision, the maxim of "*stare decisis*" is believed to be peculiarly applicable, and upon this ground this Court considers the question settled.

Apart from this view of the case, in which all the Court concur, I will briefly add my reasons for holding the law constitutional.

By the act of Congress, March 6th, 1820, the following, among other propositions, was made:—"First, that section No. 16 in every township, and when such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the State for the use of the inhabitants of such township, for the use of schools."

This grant was to be in consideration that the land sold by the United States should remain exempt from taxation for five years after the day of sale, and the

military bounty lands should be exempted from taxes for three years.—Rev. Code, 1825, p. 38.

The convention, by ordinance, accepted this proposition on the 13th July, 1820; and accordingly provided in the constitution, in art. 6, sec. 1., "that schools and the means of education shall forever be encouraged in this State; and the General Assembly shall take measures to preserve from waste or damage such lands as have been, or may hereafter be, granted by the United States for the use of schools within each township in this State, and shall apply the funds which arise from such lands in strict conformity to the object of the grant: one school or more in each township shall be established as soon as practicable and necessary, where the poor shall be taught gratis."

To carry into effect this provision of the constitution, the legislature passed an act on the 6th Dec., 1820, providing for the leasing of the school lands, and applying the proceeds to the purposes designated in the constitution. This policy prevailed until 1829, when the leasing of unimproved sections was prohibited; (act of Jan. 1, 1829;) and in 1831, the plan of selling the sixteenth section was adopted, which prevails to the present day.

This is a grant from the United States to the State of Missouri, for certain purposes, and on certain considerations specified in the grant. To construe a grant from one sovereign to another by those technical rules which govern the construction of contracts between individuals, is not reasonable nor in accordance with the doctrines recognized in judicial tribunals, when subjects of this character are investigated. The intent and spirit of the act; the purposes it was designed to promote, and the relative situation of the high contracting parties, should be examined and ascertained, and a strict legal interpretation must be rejected if it manifestly tends to subvert the ends proposed to be accomplished. It was observed by a distinguished judge, (C. J. Tighlman, in *Farmers' and M. Bank vs. Smith*, 6 Hall, L. I. 547,) that "Conventions to regulate the conduct of nations are not to be construed as articles of agreement at common law." "It is of little importance to the public," he adds, "whether a tract of land belongs to A. or B. In deciding their titles, strict rules of construction may be adhered to, though sometimes at the expense of justice, because certainty of title is thereby produced, and individual inconvenience is richly compensated by general good; but when multitudes are affected by the construction of an instrument, great regard should be paid to the *spirit and intention*."

If we apply the common law rules of construction to this grant of the school lands, we are involved in difficulties which we can only surmount by a complete subversion of every beneficial purpose for which the grant was made.

In the first place, it is conceded, that by this rule of construction the lands are inalienable. This of itself is not only contrary to the general policy of our government, which is decidedly hostile to the creation of perpetuities, and having lands locked up in mortmain, but tends directly to frustrate the obvious intent of the parties.

The object of both parties was, the advancement of education and the provision of a fund for that purpose. If the lands be inalienable, how is that purpose to be

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attained? It cannot be supposed that Congress or that convention were ignorant of the condition of the country for whose benefit they were legislating. It is folly to suppose that wild lands can be leased advantageously, when those of the best quality can be purchased for one dollar and a quarter per acre; nor is it likely that this state of things will be altered for the next half century. Did Congress design that the benefits of this grant should accrue solely to our successors, and be unavailing to the existing generation? Are we to wait for a school fund until *leasing* becomes profitable — until our population is as dense as that of Holland or Great Britain?

The *cestuys que use*, if they embraced only the present inhabitants, being the same people which constitutes the State, (who, as trustee,) might claim the land; but as it is clear that the future as well as the present inhabitants of the township are beneficially interested in this grant, the consent of the *cestuys que trust* to any disposition made by the trustee could never be obtained, and the land is inalienable.

Again: This grant cannot be construed as a common law gift to a charity. If it be so, the State of Missouri, being both *funder* and *visitor* of the fund, would have an entire control over it. But the very essence of a charitable donation is the want of consideration, which is not so in this grant. It is founded on a valuable consideration, viz., the exemption of the United States' lands from taxation.

In the third place, if this grant is to be regarded as creating a trust, and to be construed by the rules applicable to such estates, the objections are not diminished. An ordinary trustee may, under certain circumstances, and under the direction of certain courts having cognizance of these subjects, change the nature of the trust estate by converting land into money or money into land; but what court could undertake to advise this trustee, the State, or its organ, the legislature, as to the suitable disposition or management of its trust estate.

Lastly, This grant, if construed by the strict rules of common law, would be void for uncertainty in the description of the *cestuys que use*. The inhabitants of a township are not a corporate body.— Co. Litt.

These considerations are sufficient to show, that a construction of the terms of this grant, by the strict rules of the common law applicable to individual transactions, would frustrate the laudable and beneficent purposes of both the contracting parties. I therefore conclude, that some other construction must be adopted, more consistent with the intent of the parties, and more consonant with the general powers and rights of the State. It is beyond controversy, that the United States have no interest whatever in these lands; that they parted with all their title; and whether the State has, or has not executed the trust, cannot be a subject of enquiry in her courts. It is true, that in the grant to Ohio, of the 16th section, by the act of 1802, (which was to the inhabitants of the township,) Congress, at the request of the legislature of that State, passed the act of 1803, vesting these lands in the legislature of the State, in trust for the support of schools, and afterwards, to quiet purchasers, passed the act of February 1st, 1826, authorizing Ohio to sell her school lands. A reference, however, to the discussion which preceded the pass-

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age of that act, (Gales & Seaton's Register, vol. 11, p. 667, 842), will show, that neither house entertained any doubts as to the power of the Ohio legislature. It cannot be pretended, in relation to the grant to this State, that Congress has any power to compel the State to execute the trust. The legislature is restricted only by the constitution of the State. This prevents and prohibits a diversion of the fund from the purpose to which it has been dedicated. The legislature is required to apply the funds "arising from these lands," in strict conformity to the object of the grant. Whether these funds are to arise from leasing, renting, or selling, is not specified in the constitution. There is no restriction on the subject. Will it be contended, that the injunction upon the legislature to take measures to preserve the lands from waste and damage, or to improve them, implies a prohibition from selling? Such is not the construction placed upon similar measures, when taken by a private land proprietor. In the second section of the same article which regulates the duties of the legislature, in relation to the 16th section, it is provided, for the management of the seminary lands, that the monies arising from the lands, "whether by rent or lease, or in any other manner," shall constitute a fund for the establishment of a university. The terms are broad enough to comprehend a disposition of the lands by sale, as well as the specific modes enumerated in the section.

I am therefore of opinion, that the act of the legislature, authorizing the sale of the 16th section, is constitutional, and, consequently, that the plaintiff, in the case agreed, was entitled to recover.

Judgment affirmed.

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A. mortgaged the land in controversy to B. on the 10th of June, 1841; the mortgage deed was filed for record on the 25th of September following. On the 5th and 6th of July, 1841, judgments were rendered against A., and the land was sold by the sheriff, under the judgments, on the 18th of October, 1841. The sheriff's deed was dated January, 18th, 1842, and was acknowledged in court on the 23d March, 1842, and filed for record on the same day. On the day of sale the purchaser was notified of the existence of mortgage: *Eld.*

That under the statute concerning "Conveyances," (Rev. Stat. 1835, title, "Conveyances," sec. 31, 32, p. 123,) the lien of the judgment prevailed over that of the mortgage. A judgment obtained after a mortgage was executed, but before it was recorded, will prevail on the mortgage.

APPEAL from Buchanan Circuit Court.

CAMPBELL and HICKMAN, for Appellant.

1. The Circuit Court erred in giving the instructions asked by the plaintiff, (below) Paul, and in refusing to give the third instruction asked by the defendant, Hill.—See 1 Dana, 359; 1 *Ibid.*, 166; 4 Bibb, 78.

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2. That the Circuit Court erred in overruling the motions for a new trial, and in arrest of judgment. — See Rev. Stat., 1835, p. 339, sec. 1, 2, and 3; *Jones vs. Luck*, 7 Mo. Rep., 551.

NAPTON, Judge, delivered the opinion of the Court.

This was a petition to foreclose a mortgage, brought by Paul, the mortgagee, against Mitchell, the mortgagor, and Hill, the occupant of the mortgaged premises.

At the return term of the writ, Hill appeared and pleaded; at the same term a judgment was entered against Mitchell for the sum of money secured by the mortgage and costs, an appearance having been previously entered for Mitchell.

Hill's plea claimed title in himself, and denied that Mitchell had any title or interest in the premises. To these pleas replications were filed, and issue taken thereon. The issue was tried by a jury, and, under the directions of the court, a verdict was found for the plaintiff.

The facts appearing in evidence were these: The mortgage of Mitchell to Paul was dated on the 10th day of June, 1841; was acknowledged on the same day, and filed for record on the 25th of September, 1841. Hill purchased at a sheriff's sale, under judgments and executions against said Mitchell, which judgments were rendered on the 5th and 6th days of July, 1841. The sale under the executions took place on the 18th of October, 1841, and the sheriff's deed was dated January 18th, 1842, acknowledged in court March 23d, 1842, and filed for record on the same day. On the day of the sale, under execution, it appeared that Hill was informed by W. B. Almond, attorney for plaintiff, that there was a mortgage on the lot.

The Circuit Court instructed the jury, that the mortgage was good against the purchaser at the sheriff's sale.

Several objections have been taken to the regularity of the proceedings in this case, in relation to Mitchell, but as the whole merits of the controversy depend entirely on the correctness of the opinion of the Circuit Court, in regard to the relative value of the mortgage and judgment liens, we shall confine our examination to this question.

Our statute requires every instrument in writing, that conveys any real estate, or by which real estate may be affected in law or equity, to be recorded; and declares that the instrument so recorded shall, from the time of filing the same with the recorder, for record, impart notice to all persons of the contents thereof, and that all subsequent purchasers and mortgagees shall be deemed to purchase with notice. (Rev. Code, 1835, title, "Conveyances," p. 123.) The 32d section of the act declares, that "no such instrument *shall be valid*, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record."

In New York, it is held, that an unregistered mortgage has a preference over a subsequent docketed judgment, and the purchaser, at the sheriff's sale, under the judgment, is not protected against the mortgage, if the mortgage is registered before the sale. (*Jackson vs. Dubois*, 4 Johns. Rep., 217; *Jackson vs. Terry*, 13

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Johns. Rep., 471.) The statute of that State declares, that the mortgage first registered shall have a preference, and provides, that no mortgage shall defeat or prejudice the title or interest of any *bona fide* purchaser, unless the same be duly registered, according to the provisions of the statute. A judgment creditor is not considered a *bona fide purchaser* within that act, and in the case of *Jackson vs. Dubois* the court express the opinion, that the judgment being by act of law, does not destroy the *lien* acquired by an unregistered mortgage, or gain a preference over it. In *Jackson vs. Town*, (4 Cowen, 606,) the question arose as to the value of an unrecorded deed, (an unconditional conveyance,) in a county where by the law such deeds were declared void, as to subsequent *bona fide* purchasers, or mortgagees, in a contest between the grantee, in such deed, and the purchaser under a judgment against the grantor, docketed subsequently to the conveyance. The sheriff's deed, in that case, was first recorded; but the court held, that the conveyance (being admitted to be *bona fide* and for a valuable consideration) passed all the interest of the grantor, and there was nothing upon which the judgment could operate, and the grantee in the unrecorded deed was adjudged to hold the premises, in opposition to the purchaser at the sheriff's sale.

In *Jackson vs. Post*, (9 Cowen, 120,) the same doctrine is maintained. In this case, the judgment debtor conveyed his land before judgment, and though the deed was not recorded for several years after a sale under the judgment, and no notice of the first deed was given to the purchaser at the sheriff's sale under the judgment, it was held, that the conveyance by the judgment debtor was valid against the subsequent *bona fide* purchaser under the judgment.

In South Carolina the same doctrine prevails, and a prior unrecorded mortgage is preferred to a subsequent judgment. — *Executor of Ashe vs. Executors of Livingston*, 2 Bay Rep., 80.

In Pennsylvania and North Carolina the rule is different, and a judgment creditor is preferred to a prior unregistered mortgage, and is not affected by notice of it. — *Semple vs. Burd*, 7 Serg. and Rawle, 286; *Davidson vs. Cowen*, 1 B. and Dev. Eq. Ca., 470.

The statute of Kentucky declares such deeds void both as to creditors and purchasers, without notice, and in the case of *Graham vs. Samuel* (1 Dana's Ky. Rep., 166,) the Supreme Court of Kentucky determined, under their statute, that a deed not recorded within the time limited by the statute is *void* as to creditors without notice of the conveyance *at the time their debts were contracted*, and that such unrecorded conveyance will not operate as a mortgage, nor create any lien whatever in favor of the grantee, against such creditors. So, in the case of *Helm vs. Logan's Heirs*, (4 Bibb, 78,) the same court held, that a purchaser under execution is not affected by his notice of a mortgage, which was not recorded, and therefore void as to creditors. In that case it was contended, that although the mortgage might be void as to creditors, yet it was not so as to purchasers with notice, and as the purchaser at the sheriff's sale had notice of the unrecorded mortgage, he could not claim the protection of the statute. On this subject the court observe, "This doctrine cannot be admitted to be correct. Nothing could be more absurd than the recognition of such a principle. What would be its consequences? As to credit-

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ors the mortgage is void, but as to purchasers under the execution of the creditor, with notice, the mortgage, it is contended, is valid. The creditor cannot enforce the collection of his demand without execution. There must a purchaser intervene. If no other person becomes the purchaser, the creditor will be left to the alternative either to purchase himself or lose his demand; and if he purchases, he thereby loses his character of creditor, and, according to the doctrine contended for, as a purchaser with notice, cannot be protected. A doctrine fraught with such consequences we are not prepared to recognize."

By the British statute it is enacted, that all deeds concerning estates, &c., shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee, for valuable consideration, unless a memorial thereof be registered in the manner thereby prescribed, before the registering of the memorial of the deed under which such subsequent purchaser or mortgagee shall claim. (Sugden on Vendors, 236.) This statute was made for the protection of innocent *bona fide* purchasers without notice, and nothing is said about creditors. Hence, it is held in England, that a subsequent purchaser, with notice of an unrecorded deed, is a *mala fide* purchaser, and therefore not entitled to the protection of the statute.

The principle upon which the English doctrine of notice is founded is highly equitable; but the Kentucky courts considered that it would be a gross perversion of equity to introduce the same rule in giving construction to their statute, which, unlike the British Registry acts, was not confined to purchasers without notice, but extended to creditors. Their observations on this topic are forcible, and not inapplicable to our act. "If the principle," the court observes, "be of the pure equitable origin, and indubitable justice, that we admit it to be, it must require that the creditor should have had notice at the time the debt was contracted, when, according to the intendment deducible from the whole scope and policy of the statute, he was liable to be prejudiced by the non-recording of the deed. Notice at any subsequent period could with no show of equity or propriety be considered so far to affect his conscience as to deprive him of the protection against a secret and unrecorded conveyance, which is extended to him by the very letter of the act. We should make the law "palter" with him, and cheat him with the mere word of promise, were we to determine, that after having declared all unrecorded deeds should be void as against him, when he came to demand the benefit of this declaration, its whole fruition should be snatched from him by the production of a notice of the unrecorded instrument. It would be mere mockery to hold out the idea of protection to creditors against secret conveyances, and yet, when they come to enforce their demands, to permit the secret purchaser to deprive them of protection, by the exhibition of his unrecorded deed."—1 Dana, 168.

Our statute, it will be observed, is somewhat different from any of those commented on and construed in the preceding cases. Its protection is not, like the British and New York Registry acts, confined to *bona fide* purchasers without notice, nor, like the Kentucky statutes, does it in terms embrace creditors as well as purchasers. Its language is general and unqualified; it declares that no unregistered deed *shall be valid*, except between the parties, and such as have actual notice thereof. It is comprehensive enough to embrace creditors as well as pur-

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chasers. The unrecorded deed is declared *void* as to all the world, except the parties to it, and those having actual notice. With this understanding of our statute, is it not obvious, that the reasoning of the Supreme Court of Kentucky, in the case of *Graham vs. Samuel*, applies most forcibly, and is recommended by its simplicity and good sense? If the statute protects the *creditor* from the lien of an unrecorded mortgage, would it not completely and effectually destroy the end and purpose of the act to say, that the purchaser under the creditor's judgment stands in no other or better predicament than a direct purchaser from the mortgagor?

To render the lien of the judgment valuable, the creditor must have his execution; but if the purchaser at the sheriff's sale is affected by the notice of the unrecorded deed, the rights of the judgment creditor are destroyed. If the creditor had notice at the time his debt was contracted, the equitable doctrines of notice prevailing in England and New York might then be urged with some show of reason; but a notice given at a sale under his judgment cannot, and should not, alter or affect his rights. When he proceeds to judgment, he is only pursuing the course to secure his debt pointed out by law, and his knowledge of an unrecorded mortgage could not affect his conduct in any respect. He acquires the first *lien*, and that lien should not be divested by a secret conveyance, of which he had no knowledge when the credit was given.

The doctrine of the New York courts we think inapplicable to our statute, and the opinion of the Circuit Court on the question of notice was, we think, erroneous.

The judgment will therefore be reversed, and the cause remanded.

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1. Where a person committed for any offence is brought before any court or magistrate under the habeas corpus act, he cannot be discharged for any "informality, insufficiency, or irregularity of the commitment;" therefore, where a person was charged in the commitment with the commission of manslaughter, and it appeared that the offence was only an assault with intent to kill, the magistrate before whom the prisoner was brought properly described the offence in the recognizance as an assault, &c.—Rev. Stat. 1835, title, "Habeas Corpus," art. 3, sec. 13, p. 303.
2. Where a *scire facias* is issued on a forfeited recognizance in a criminal case, it is not necessary that the *scire facias* should contain an averment that an indictment had been found against the principal in the recognizance.
3. On a *scire facias* the court will give judgment according to law, and not according to the prayer of the plaintiff. Therefore, where the writ of *scire facias* required the defendants to show cause why the same should not be levied of "their respective *bodies*, lands and chattels," instead of "their respective goods and chattels, lands and tenements," the error was held not to vitiate the writ, but considered as a mere clerical blunder.

APPEAL from Ray Circuit Court.

EDWARDS, for Appellants.

1. The Circuit Court erred in overruling the motion, made by the securities, to quash the recognizance.

Can a prisoner brought before a circuit judge upon "*habeas corpus*," be recognized to answer to an indictment for an offence of a nature wholly different from that for which he was committed by a justice of the peace? Is not such recognizance "*coram non judice*," and void?—*Delacur vs. Reed*, 2 Hen. Black., 278; 1 Sand. Rep., 71, note; *Crutchfield vs. Seyward*, 2 Wils., 39, 93; *The United States vs. Johns*, 4 Dall., 413.

2. The prosecuting by "*scire facias*" is a suit; the writ is a substitute for a declaration in debt; and the former must be certain as to *time* and *place*, and have the general requisites of the latter.—1 Littel, 164; 5 Littel, 59; 2 Sand. Rep., 6, a note, 71, note; *Tidd's Practice*, 982; 5 Mo. Rep., 425.

3. The writ in this cause is therefore bad, and the demurrer should have been sustained.

I. It does not aver that any indictment of any character was at any time proffered against the principal in the recognizance.

II. That the several sums for which execution is sought have not been paid.—5 Littel, 60; 4 Monroe, 2; 2 Chitty's Plead., 474, note.

III. There is no venue laid or charged to the averment that the principal and sureties "were solemnly called and came not, but made default," or to the averment that "the securities, nor either of them, would bring into court the body of the principal;" nor to the averment that "the recognizance was forfeited."

IV. There is no averment that execution had issued against the principal.—Rev. Stat., 455, sec. 11.

V. There is no averment that the recognizance was returned to the clerk of the court sustaining the suit.—2 Marshall, 249.

VI. The terms of the recognizance are, that the several sums of money for which the principal and his securities are bound are to "be levied of their respective goods and chattles, lands and tenements." The writ asks that they show cause why the same should not "be levied of their respective *bodies, lands and chattels*:" the breach stated is not, therefore, co-extensive with, and according to, the terms of the obligation.—Sand. Plea and Ev., 134, 750.

VII. The State did not join in demurrer; and this court, in proceeding to do what the Circuit Court ought to have done, will give judgment for the plaintiffs, more especially as a *scire facias* cannot be amended by the insertion of the proper averments of matters *in pais*, and the statute of "*Jeofails*" does not apply.—5 Littel, 59, 60; 1 *Ibid.*, 164; 4 Monroe, 148, *Tidd's Practice*.

VIII. The judgment is not in pursuance of the writ; if any, it should have been that the State have execution, &c.

IX. The principal in the recognizance was arrested and committed for an offence

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unknown to the law : he was recognized to answer to a different offence, and indicted for a third offence. Were not the recognizance and all proceedings thereon *coram non judice*?

DUNN, *Circuit Attorney, for the State.*

1. The court cannot look into the proceedings anterior to the recognizance.
2. The court committed no error in overruling the motion of the defendants below to quash the recognizance.
3. The court committed no error in overruling the demurrer of the defendants to the *scire facias*, and giving judgment for the State.

TOMPKINS, J., *delivered the opinion of the Court.*

On the 29th day of October, 1839, Samuel Snowden was brought before two justices of the peace of Ray county; and, after examination, their transcript was filed in the Circuit Court, which shows that he was by them found guilty of manslaughter, and committed for further proceedings, according to law. The warrant shows that Snowden was on the said day committed on a charge of manslaughter for stabbing *Robert Mitchell* and *William McGaugh*, with intent to kill. On the same day he was brought, on a writ of *habeas corpus*, before Austin A. King, the judge of the Circuit Court for the fifth judicial circuit, and entered into a recognizance in the sum of \$1,000, with five securities, each bound in the sum of \$200 respectively. The condition of this recognizance was, that if the above-bound Samuel Snowden should appear at the Circuit Court, at its next term, on the first day thereof, to answer an indictment to be preferred to the grand jury for stabbing *Robert Mitchell* and *William McGaugh*, with intent to kill, whereof he stands charged, and shall not depart the same without the leave of the said court, then this recognizance to be void, else to be in full force.

Afterwards, on the tenth day of December, in the year 1839 aforesaid, and on the second day of the term, the grand jury returned into open court a bill of indictment against Samuel Snowden for an assault, with intent to kill. On the 14th day of December aforesaid, and on the sixth day of said term, Snowden and securities being solemnly called, came not; and the securities failed to produce Snowden, their principal: it was, therefore, considered that the recognizance, both as to the principal and security, be forfeited.

The defendants then, by their counsel, filed a motion to quash the recognizance, which was continued till the then next term of the court. This motion being overruled, a *scire facias* was issued. It was returned, served on all the defendants, except Snowden, who was not found. The *scire facias* was demurred to, and the demurrer overruled by the court.

To reverse the judgment of the Circuit Court, the defendants prosecute their appeal.

The first error assigned is, that the Circuit Court erred in overruling the motion made by the securities to quash the recognizance.

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2. The *scire facias* is defective in not being certain as to time and place.

3. It does not aver that any indictment has been preferred against the principal in the recognizance.

4. Nor that the several sums for which execution has been sued out have not been paid.

I. That the court committed error in refusing to quash the recognizance entered into before the judge of the Circuit Court.

The commitment being, it is said, on a charge of manslaughter, for stabbing with intent to kill, it is gravely asked, can a recognizance be taken to answer an indictment for stabbing with intent to kill?

The prisoner was brought before the judge of the fifth judicial circuit, on his own petition. In the 13th section of the Habeas Corpus Act, p. 203 of the Digest of 1835, it is declared, that "Where the imprisonment is for a criminal, or supposed criminal, matter, the court or magistrate before whom the prisoner shall be brought under the provisions of this act, shall not discharge him for any informality, insufficiency, or irregularity of the commitment; but if, from the examination taken and certified by the committing magistrate, or other evidence, it appear that there is sufficient legal cause for commitment, he shall proceed to take bail, if the offence be bailable and good bail be offered; if not, he shall commit the prisoner to jail."

Manslaughter is the killing of a human being in a sudden affray, or in the heat of blood: it is an offence known to the law. To stab, with intent to kill, is an offence against the statute law. (Sec. 31 of 2d article of the act concerning crimes and punishments, p. 171 of the Digest of 1835.

Manslaughter supposes a life taken: stabbing, with intent to kill, supposes the life not taken. To say, then, that the prisoner was committed on a charge of manslaughter for stabbing with an intent to kill, is such an irregularity as, under the 13th section of the Habeas Corpus Act above cited, the circuit judge ought to have corrected, and in this case he did correct it. For the honor of the State, an intelligent and charitable attorney would have passed over this matter, and concealed the blunder of the justice of the peace. I will pass over the other reasons for quashing.

II. The *scire facias* is alleged to be defective in not being certain as to time and place. The *scire facias* charges, that the defendant did, on the 21st day of October, in the year of our Lord one thousand eight hundred and thirty-nine, at the county of Ray aforesaid, enter into a recognizance, &c. Both time and place are here alleged.

III. That it does not appear that an indictment was preferred against the principal in the recognizance. The condition of this recognizance was, that the defendant should appear, &c. Neither Snowden nor his security had any right to know anything about the indictment, if any, till they had answered to the call of their names. Any officer of the court, or any grand juror, would have been guilty of a misdemeanor who should give any information that such indictment was found, or even preferred to a grand jury.

IV. That it does not appear that the several sums for which execution had been sued out have not been paid. To this point the case of *Holland vs. Bouldin*, 4

Snowden et al. vs. The State.—Freeland vs. Mitchell, Administrator of Thomas.

Monroe's Ky. Rep., 148, is cited. That case is as follows:—On the 21st of August, 1821, Holland entered into a recognizance of bail to the action (called, commonly, special bail), on a *capias ad respondendum*, sued out by Bouldin against Fowler: on the 24th November, 1821, judgment was rendered against Fowler. On the 17th May, 1823, Bouldin sued out a *scire facias* against the bail upon this recognizance, and it was decided that bail could not formerly be charged without a *ca. sa.*, sued before *scire facias* on the recognizance, and that the want of a *ca. sa.* was formerly a good plea is not doubted; but that since, by the act of the Kentucky legislature, abolishing imprisonment for debt, is not a good plea. The judgment in that case was not obtained against Holland, the special bail, but had been against Fowler, the principal; therefore it was necessary to issue execution against the principal, before the bail could be called in to answer for his default. The object of this *scire facias* is to get judgment against both of them: as for the remaining part of the authorities cited which I have been able to find, they have no bearing on the subject.

It is further objected to the *scire facias*, "That the writ requires the defendants to show cause why the several sums of money should not be levied of their respective bodies, lands and chattels;" whereas the law requires the money to be levied of their "respective goods and chattels, lands and tenements;" therefore it is concluded that the breach stated is not co-extensive with, and according to the terms of, the allegation. In all this I see no breach. It is a mere clerical blunder: the law directs on what property the money is to be levied. The defendants are bound to know that law: moreover, the court will give judgment as the law directs, not according to the prayer of the plaintiff in the *scire facias*.

The judgment of the Circuit Court must be affirmed.

FREELAND vs. MITCHELL, ADMINISTRATOR OF THOMAS.

1. A. sold to B. a certain tract of land, and bound himself in the penal sum of six hundred dollars to give B. possession of the land by a certain day. B., in the same instrument, bound himself to pay A., by that day, a certain sum, the consideration money. *Held:* That had there been no penalty annexed to the covenant of A., his covenant to give possession would have been dependent on the covenant of B. to pay the consideration money. But the penalty annexed to the covenant of A. made the covenant independent.
2. Covenants, in relation to their dependence or independence, are to be construed according to the intention and meaning of the parties, as gathered from the instrument. A covenant with a penalty annexed will always be considered as dependent.

Freeland vs. Mitchell, Administrator of Thomas.

APPEAL from Platte Circuit Court.

S. L. LEONARD & E. L. EDWARDS, *for Appellant.*

The Circuit Court erred in overruling the demurrer. — 1 Chitty's Plead., 353-6; Johnson *vs.* Wygant, 11 Wend., 48; Champlin *vs.* Rowly, 13 Wend., 258; Cunningham and others *vs.* Morrell, 10 Johns. Rep., 203; *Ibid.*, 258.

HICKMAN, *for Appellee.*

The only question now presented for the consideration of this court, worthy of notice, is — was the delivery of the possession of the land mentioned in the contract upon which this writ is founded, a condition precedent to a right to recover upon the contract? To show that it is not such a condition, a great many authorities might be produced, if deemed necessary. We refer to the case of Hancock *vs.* Vanta, Hardin's Rep., 510; Bennett *vs.* the Executors of Pixley, 7 Johns. Rep., 249; Best's Administrator *vs.* Brancham, 1 Mo. Rep., 420; Cook *vs.* Johnson, 3 Mo. Rep., 172.

NAPTON, J., *delivered the opinion of the Court.*

Mitchell, administrator of Thomas, brought an action of debt against the appellant, upon the following agreement: — "Article of Agreement, made and entered into this 20th of November, 1839, between Valentine Thomas of the one part, and John Freeland of the other part, and both of the county of Platte and State of Missouri: The said party of the first part has, on the date aforesaid, bargained and sold to the said party of the second part all his right, interest and claim to one quarter section of public lands, to include where the said Thomas now resides, and bounded as follows, to wit; [here the boundaries are given] and the said Thomas binds himself in the sum of six hundred dollars to give said Freeland possession of the boundary aforesaid, on or before the first day of June next, and also is to give said Freeland privilege to make any improvements he may think proper previous to the time of getting full possession; and the said Freeland binds himself to pay to the said Thomas three hundred dollars, as follows, to wit — one hundred dollars in hand, and one horse beast at its valuation, and the balance on or before the first day of June next. In witness whereof, &c. Signed and sealed by

"THOMAS & FREELAND."

The declaration did not aver any delivery of the possession on the first day of June; a demurrer was filed and overruled, and the court gave judgment for the plaintiff on the demurrer for the sum of \$150 debt, and \$28 12½c. damages.

The case is brought here by appeal.

The only question is, whether a delivery of the possession of the land mentioned in the contract sued on is a condition precedent to the recovery of the money.

Freeland vs. Mitchell, Administrator of Thomas.—Sisk vs. Clark and Wife.

The only principle to be extracted from the numerous cases in relation to the dependence or independence of covenants is, that they are to be construed according to the intention and meaning of the parties, and the good sense of the case.

There can be no doubt but that the covenant of Thomas to give possession on the first day of June, had there been no penalty annexed to it, would have been considered as dependent on the covenant of Freeland to pay the balance of the purchase money at the same date.

The case would have fallen within the principle decided in *Cunningham vs. Morrell* (10 Johns. Rep., 203), and the cases there cited. But the covenant of Thomas was to give possession on the first day of June, under a penalty of six hundred dollars; and unless this be construed as an independent covenant, it would render the covenant and the penalty entirely nugatory. It is apparent that Freeland relied on this covenant, otherwise he would not have bound him in a penalty.

The case, then, is distinguishable from any of the cases cited by the plaintiff in error in this important particular; and we have not been able to find any reported case in which a covenant, with a penalty annexed, was held to be dependent.

The averment of the delivery of the possession was, therefore, unnecessary, to enable the executor of Thomas to maintain his action, and the demurrer was rightly overruled.

Judgment affirmed.

SISK vs. CLARK AND WIFE.

APPEAL from Monroe Circuit Court.

VAN ARSDAL and HICKMAN, for Appellant.

HOWELL, for Appellees.

TOMPKINS, Judge, delivered the opinion of the Court.

William Clark and wife commenced their action of assumpsit against Layton Sisk, in the Circuit Court, to recover money received in Kentucky by Sisk, guardian of Clark's wife. The jury found a verdict against this guardian, Sisk, for \$802 13, and judgment was entered up against him, to reverse which this appeal is prosecuted.

The bill of exceptions shows that the defendant prayed the court to instruct the jury not to find against him, unless they also found a demand made by the plaintiffs before they brought their action. The instruction was given, and the jury

Sisk vs. Clark and Wife.—Hawkins vs. Welch.

found as above stated, on record evidence, to wit: a certified record of the settlement of commissioners appointed by the County Court of Garrard county, in the State of Kentucky, to settle with John Hill, the guardian of the heirs of Abner Pollard, deceased, in said court. No contradictory testimony was introduced.

The judgment of the Circuit Court is affirmed.

HAWKINS vs. WELCH.

A party who has paid money or property by way of usurious interest cannot recover the amount so paid, where, upon such recovery, a part of the principal debt would remain due and unpaid.

APPEAL from Crawford Circuit Court.

MILLER, for Appellant.

1. The instructions given are not according to law, nor did the evidence given in the cause authorize the giving of the instruction.
2. The instructions asked by the defendant ought to have been given.
3. The court erred in modifying the defendant's instructions, and then refusing them.
4. The finding, by the jury, was against evidence.
5. The finding was for more than the value of the property.
6. A party cannot, by making a voluntary payment of an illegal demand, afterwards turn round and sue for it, without showing a different state of facts than is shown in this record.
7. The court erred in overruling the motion to dismiss the cause, for insufficiency of return.

MINOR, for Appellee.

1. The notice to the appellant, to appear before the justice, was sufficient, and the return of the special constable was legal and conclusive.—Stat. Mo., 351, sec. 14.
2. The Circuit Court committed no error in refusing to give the two instructions (even as modified) first asked for by the appellant; and the single instruction, affecting the right of the appellee to recover, which was given by the court, was correct.—*Robinson vs. May*, Cro. Eliz., 588; *Moses vs. McFarland*, 2 Burr. Rep., 1005, and *Coop. Justinian*, where all the American and English authorities on this point are collected and analyzed: *Clark vs. Shee*, Cowper's Rep., 199; 2 Tucker's Com., 132, *Wheaton vs. Hibbard*, 20 Johns., 292; *Comyn on Usury*, 1 Law Library, 80; *Eden on Injunctions*, 38.

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3. If the instructions given by the court were correct, then the verdict of the jury was right, and therefore a new trial should not have been granted.

4. The act of the general assembly, of 27th February, 1841, on the subject of interest, (session acts, 95,) does not, in its repeal of the 4th section of the act of 1835, affect the right of the appellee to recover in this action.

TOMPKINS, J., delivered the opinion of the Court.

Ivy Welch sued A. H. Hawkins before a justice of the peace, and there obtained judgment against Hawkins; Hawkins appealed to the Circuit Court of that county, and that court also gave judgment against him, to reverse which this appeal is prosecuted.

The bill of exceptions shows that the defendant, Hawkins, moved the court to dismiss the cause from its docket, because the service of the justice's summons was not legal.

Hawkins, after judgment against him, by default before the justices, moved to set aside that judgment, and his motion being overruled, he appealed to the Circuit Court. In that court he had a new trial, as the statute directs, without regard to any error, defect, or other imperfection in the proceedings of the justice.—Sec. 8, art. 8, of the act concerning justices' courts, p. 370 of the Digest of 1835.

This is all the testimony in the case:

"Mr. Sanders, a witness in behalf of the plaintiff, testified, that some time last June (1842) the plaintiff and defendant were at his house, and some conversation passed betwixt them respecting two judgments for \$150, each at ten per cent., which the defendant had confessed in favor of the plaintiff, before witness, who was a justice of the peace; that they went out, and on their return Hawkins stated that he had bought a mare and colt of the defendant at \$120, and that the mare and colt paid up the interest on said judgments, and thirty dollars of the principal, on the debt. Upon examination of the witness by the court, he stated, that the mare and colt paid up the usurious interest, over and above ten per cent., and thirty dollars on the debt, and that the mare and colt were worth about \$75." This was all the testimony for either party, and upon this testimony the jury found a verdict for the plaintiff for ninety dollars, and the defendant moved the court to grant a new trial for these reasons:—

1. The verdict is against law and evidence.
2. The court gave improper instructions.
3. The court refused to give proper instructions.

The court instructed the jury, that if they believe, from the evidence, that the mare and colt was paid to the defendant by way of usurious interest, that is for more than ten per cent., according to the contract of the parties, the plaintiff has the right to recover the usurious interest so paid.

In *Wheaton vs. Hibbard*, 20 Johns., 293, Spencer, Chief Justice, says—"It is undeniable that a party who has paid excessive interest may, at common law, recover the excess, in an action for money had and received. The law considers the borrower rather as a victim than an aggressor. The statute prohibits usury,

Hawkins vs. Welch.—Lambert vs. The State.

in order to protect needy and necessitous persons from the oppression of usurers, who are eager to take advantage of the distresses of others, and who violate the law only to take advantage of their ruin. In such a case, the maxim, *potior est conditio defendentis*, has never been applied. But the party injured cannot recover any part of the principal and legal interest, and to entitle him to maintain the action, he must show that he has done all that equity requires."

It appears in evidence, on this record, that Welch had confessed two judgments to Hawkins, before a justice of the peace, of \$150 each, at ten per cent.; that the plaintiff and defendant walked out, and on their return, Hawkins told the witness, that he had bought a mare and colt of the defendant, at \$120, and that the mare and colt paid up the interest on said judgments, and \$30 upon the principal. The witness said the mare and colt paid the usurious interest above ten per cent., and \$30 of the principal, and that the mare and colt were worth about \$75. Here, if we estimate the mare and colt at \$75, as did the witness, it will appear that the plaintiff still owes the defendant \$225, after deducting that sum from \$300, the amount of the judgments confessed before the justice of the peace. But if the mare and colt are to be estimated at the sum of \$120, still the plaintiff will owe the defendant \$180, and if the plaintiff now obtain a judgment against the defendant for \$90, and collect that money from the said defendant, the plaintiff may, himself, become insolvent, and be unable to collect the principal, or rather that which remains of the principal, after deducting the price of the mare. The Circuit Court, then, committed error, in instructing the jury, that so much of the price of this mare and colt as was applied to the payment of usurious interest could be recovered in this action, although it appeared in evidence that the principal was yet unpaid.

The judgment of the Circuit Court must be reversed.

LAMBERT vs. THE STATE.

The selling of spirituous liquors after nine o'clock on Sunday is indictable, whether the party selling has a license to vend spirituous liquors or not. The privilege conferred by the license is subject to the restraints imposed by the general law in force when the license is granted. Such a license confers no right to violate the provisions of the Criminal code.—See R. S. 1835, title, "Crimes and Punishments," art. 8, sec. 31, p. 209; *Ibid.*, "Inns and Taverns," p. 316.

APPEAL from St. Louis Criminal Court.

BAY, *Attorney-General, for the State.*

I. The act of March 18th, 1835, concerning "Inns and Taverns," so far as the same relates to the selling of wines or spirituous liquors, was virtually repealed by

Lambert vs. The State.—Dameron vs. The State.

the provisions of the act of February 16th, 1641, concerning "Groceries and Dram-shops."

2. The right conferred by the license of the defendant must be exercised in conformity to the existing laws. The license does not confer a right to violate a positive law, but must be exercised subject to all the restraints imposed by law at the time the license was granted.

3. The finding of the jury is warranted by the evidence: indeed, the commission of the offence is clearly proven.—Art. 8, sec. 31, of the act concerning "Crimes and Punishments," Rev. Stat., p. 209.

NAFTON, J., delivered the opinion of the Court.

The appellant was indicted, under the 31st sec. of the 8th art. of the act concerning "Crimes and Punishments," for selling distilled liquors after nine o'clock on Sunday. To this indictment the defendant pleaded not guilty; and a special plea, setting forth that he was duly licensed to keep an inn and tavern, by virtue of which license he did, on the day and year charged, sell distilled liquors, after nine o'clock in the forenoon of said day, "as diet to travellers and other guests, tarrying and frequenting at the inn and tavern of him, the said defendant," as he was authorized to do by an act entitled, &c.

The State demurred to the special plea, and the court sustained the demurrer. A trial was had upon the issue of "not guilty," and the defendant convicted and fined.

Exceptions were taken to the opinion of the court on the point of law raised by the demurrer, and the correctness of that opinion is the only matter to be determined.

The privilege conferred by a license to retail spirituous and fermented liquors is subject to the restraints imposed by the general law in force when the license is granted. Such a license confers no right to violate the provisions of the criminal code: the judgment of the Criminal Court of St. Louis is, therefore, affirmed.

GOUIN vs. THE STATE.

APPEAL from St. Louis Criminal Court.

NAFTON J. delivered the opinion of the Court.

This case is exactly like the case of *Lambert vs. The State*.
The judgment will be affirmed.

*Dameron vs. The State.***DAMERON vs. THE STATE.**

In an indictment for "open, gross lewdness, or lascivious behaviour," under the eighth section of the eighth article of the act concerning "crimes and punishments," (Rev. Stat., 1835, p. 206,) it is not sufficient to charge the defendant generally, in the words of the statute, with being guilty of "open, gross lewdness and lascivious behaviour," by then and there publicly cohabiting with one F., &c.; but the specific act in which the lewdness or lasciviousness is displayed must be specified, with that degree of certainty that would advise the accused of the specific charge he is called upon to answer.

ERROR to Jasper Circuit Court.**HENDRICK, for Plaintiff in Error.**

NAPTON, J., delivered the opinion of the Court.

The plaintiff in error was indicted by the grand jury of Jasper county, under the eighth section of the eighth article of the act concerning crimes and punishments. The indictment charged that the defendant, on, &c., at, &c., "was guilty of open, gross lewdness and lascivious behaviour, by then and there publicly cohabiting with one Sally Ann F., against the form of the statute," &c.

The defendant moved to quash the indictment, but the court overruled the motion. A trial was had, and the defendant convicted and fined. No bill of exceptions was taken, preserving the evidence, and the only matter properly before the court is the sufficiency of the indictment.

The eighth section of the eighth article of the act concerning crimes and punishments, provides against three classes of offences. The two first can only be committed where one of the guilty parties is married; the third may be committed by a person either married or single, and is, in the words of the law, some act of "open, gross lewdness or lascivious behaviour." In a prosecution for the last offence, it is not sufficient to charge the defendant generally, in the words of the act, with being guilty of "open, gross lewdness and lascivious behaviour," but the specific act in which the lewdness or lasciviousness is displayed must be specified at least with that degree of certainty that would advise the accused of the specific charge he is called on to defend.

It seems to us that this is not done in this indictment with that clearness and certainty which is requisite in criminal pleadings. If the act of lewdness charged was designed to embrace the offences specified in the two first clauses of the section, with the omission of the aggravating incident that one of the parties was married, there should have been a distinct averment to that effect; and if the words "by publicly cohabiting with one S. F.," could be regarded as such averment, or as supplying the place of such averment, the charge is still defective in not employing some language indicative of a continuous offence, and negating the idea of a single act of cohabitation. It should have been "by publicly, lewdly and lasciviously abiding and cohabiting with one F."

McGee vs. The State.

If, on the other hand, the act of lewdness or lascivious behaviour designed to be charged was not of the character specified in the two first clauses of the eighth section, but a single act of that character, performed in a manner so public as to be offensive to the public morals, the charge is entirely insufficient and uncertain. The time, place, and manner should have been so described that the party could have known how to defend himself. The averment, if it can be considered such, is indefinite, and leaves it very uncertain what character and kind of offence the prosecutor designed to charge.

Judgment reversed.

McGEE vs. THE STATE.

1. Upon the trial of an indictment for murder in the first degree, a verdict that the jury find the prisoner "*guilty in manner and form as he stands charged in the indictment*," is insufficient; the 1st section of the 7th article of the act concerning "Practice and Proceedings in Criminal Cases," making it the duty of the jury, "if they convict the defendant, to specify in their verdict of what degree of the offence they find the defendant guilty."—R. S. 1835, p. 493.
2. Whatever may be taken advantage of in arrest of judgment may be corrected by writ of error.

APPEAL from Scott Circuit Court.

CHAPMAN, for Appellant.

NAPTON, J., delivered the opinion of the Court.

The appellant was indicted by the grand jury of Scott county for the murder of one Medad Randall. The indictment charged, that the defendant "feloniously, wilfully, deliberately, and premeditatedly, and of his malice aforethought," assaulted the said Randall, and with a knife, "feloniously, wilfully, deliberately and premeditatedly, and of his malice aforethought," struck the said Randall upon his right breast, a little above the right nipple, giving him a mortal wound, of which he instantly died. The indictment, in other respects, pursues the usual form of indictments for murder in the first degree.

The defendant having pleaded "not guilty," counsel was appointed by the court to defend the prisoner. A trial was had, and the jury found the following verdict: "We of the jury do find the prisoner, John McGee, guilty in manner and form as he stands charged in the indictment." A motion for a new trial was made, which was overruled, and a bill of exceptions was taken, preserving all the testimony given at the trial. The prisoner was sentenced to be hung; but an appeal having been prayed for and allowed, the circuit judge stayed the execution of the sentence until the opinion of this Court could be taken.

McGee vs. The State.—Brua vs. The State.

Our statute, in relation to practice and proceedings in criminal cases, (Rev. Code, 493,) provides that, "Upon the trial of any indictment for any offence, where, by law, there may be conviction of different degrees of such offence, the jury, if they convict the defendant, shall specify in their verdict of what degree of offence they find the defendant guilty." The verdict of the jury in this case is not in conformity to this provision, and the judgment should have been arrested. Under the indictment, the defendant might have been convicted of murder in the second degree, or of manslaughter, and the court could not, as the verdict of the jury stood, know what judgment to render. Whatever may be taken advantage of in arrest of judgment may be corrected by writ of error.

As the judgment of the Circuit Court must be reversed, and a new trial awarded, we deem it unnecessary to express any opinion in relation to the sufficiency of the testimony to convict the appellant of the crime of murder in the first degree.

Judgment reversed, and cause remanded.

BRUA vs. THE STATE.

This case involves the same question determined in the case of *Lambert vs. The State*, *anti*, p. 492.

APPEAL from Criminal Court of St. Louis.

BAY, *Attorney-General, for the State.*

NAPTON, J., *delivered the opinion of the Court.*

The appellant was indicted for selling distilled and fermented liquors, after nine o'clock of the forenoon of Sunday. On the trial the defendant gave in evidence a dram-shop license, and also testimony to show that he received no pay for liquors drunk at his shop on such occasions. The court instructed the jury, that if the defendant sold distilled or spirituous liquors after nine o'clock in the forenoon of the day commonly called Sunday, he was guilty of a violation of the law, notwithstanding his dram-shop license: with this instruction, the jury passed upon the evidence, and found the defendant guilty.

This case involves the same question determined in the case of *Lambert vs. The State*, and the judgment of the Criminal Court of St. Louis is affirmed.

Bach vs. The State.

BACH *vs.* THE STATE.

The defendant was indicted under the 31st section of the 8th article of the act concerning "Crimes and Punishments," (R. S. 1835, p. 209,) for selling "fermented liquors" after nine o'clock on Sunday morning, and was found guilty. The evidence was that defendant sold *Ale*, and some evidence was given tending to show that ale was a fermented liquor: *Held*, That whether *ale* was a fermented liquor or not was a question for the jury, and it not appearing that the court misdirected the jury in relation to that or any other question arising on the trial, the judgment was affirmed.

APPEAL from St. Louis Criminal Court.

BAY, *Attorney-General, for the State.*

1. The instructions, if any were asked, are not preserved in the bill of exceptions, therefore it does not appear from the record that the court misinstructed the jury.

2. The evidence sustains the charge, that ale is a "fermented liquor;" and the selling of it, after nine of the clock in the morning of Sunday, is prohibited by the 31st sec. of the 8th art. of the act concerning "Crimes and Punishments."

NAPTON, J., *delivered the opinion of the Court.*

The appellant was indicted, under the 31st sec. of the 8th art. of the act concerning "Crimes and Punishments," for selling fermented liquor after nine o'clock on Sunday, and was convicted and fined.

A bill of exceptions was taken at the trial, from which it seems that the appellant sold *ale* on the day, and at the time, prohibited by the act. Some testimony was given, tending to show that ale was a fermented liquor; but no instructions are placed on the record, if any were given. A motion for a new trial was made, and overruled.

Whether ale was a fermented liquor or not, was a question for the jury; and it not appearing that the court misdirected them in relation to that or any other question arising on the trial, the judgment is affirmed.

Keim vs. Daugherty.

KEIM vs. DAUGHERTY.

1. The 27th section of the act of January 28th, 1839, concerning "forcible entry and detainer," (session acts of 1838, '39, p. 48,) makes it the duty of the appellant himself to file the transcript of the justice's proceedings, on or before the return day of the appeal, and his failure to do so gives the appellee the right to produce the transcript, and have the judgment of the justice affirmed. And where the judgment is thus affirmed, a writ of restitution may be issued from the Circuit Court.— See same act, sec. 34, 41.
2. A. brought an action of "forcible entry and detainer" against B., in the township of C. On the trial, the jury being unable to agree, were discharged, and the cause, on motion of A., was removed to another township in the same county: *HeM*, That there was no error in the removal of the cause, as the jurisdiction of the justice was co-extensive with the county.— See Rev. Stat., 1835, title, "Forecible Entry and Detainer," sec. 5, p. 278, and "Justices' Courts," art. 1, sec. 6, p. 348.

APPEAL from Platte Circuit Court.

JONES and HICKMAN, for Appellants.

1. Archibald Hill, being a justice of the peace for Preston township, had no right to try the case in Platte city, that being in Carroll township, and consequently beyond his jurisdiction. To show that he had no jurisdiction, authority is deemed unnecessary, as the power is nowhere given to him by the statute to try the case in a different township from his own.

2. The Circuit Court has no power to enter any judgment in this case, except such as is directed by the 27th section of the statute of 1839, p. 48. There the Circuit Court is only authorized to affirm the judgment of the justice on the production of a transcript by the appellee. But in this case the court has not only affirmed the judgment of the justice, but entered up a judgment of its own in the case, which is not authorized by the statute.

3. The court ought to have permitted the defendant, Keim, to have filed the transcript and the papers in the case, for the cause shown in his affidavit.— See statutes of 1835, p. 49, sec. 27.

4. If the justice had no jurisdiction to try the case out of his own township, judgment rendered by him is void, and the judgment of the Circuit Court is also void.

5. The Circuit Court ought, upon the application of Keim, to have set aside the affirmances of the judgment of the justice.

The Supreme Court will notice errors apparent upon the record and proceedings below, whether a bill of exceptions is filed or not. (1 Mo. Rep., 187; 5 Mo. Rep., 112; 7 Mo. Rep., 285.) The Supreme Court will notice errors such as would have been fatal on motion in arrest of judgment.— 6 Cranch, 221.

Keim vs. Daugherty.

S. L. LEONARD and E. L. EDWARDS, for Appellee.

1. The Circuit Court did not err in affirming the judgment of the justice.—See Session Acts 1838, '39, "Forcible Entry and Detainer," sec. 27.

2. Actions of forcible entry and detainer may be tried by any justice of the peace of the county, and the proceedings in such cases need not necessarily therefore be confined to any particular township in such county.—Revised Code, 1835, p. 278, sec. 5, p. 348, sec. 6.

3. The appellant having filed no bill of exceptions, the Supreme Court will presume that the Circuit Court decided correctly.—See *Crane vs. Taylor*, 7 Mo. Rep., 285, and authorities there cited.

TOMPKINS, J., delivered the opinion of the Court.

William H. H. Daugherty sued out a writ of forcible entry and detainer against Daniel Keim, to appear before a justice of the peace for Preston township, in the said county of Platte. The parties appeared, and the case was submitted to a jury, who, being unable to agree in their verdict, were discharged by the justice. Afterwards, on the motion of Daugherty, the plaintiff, the cause was removed to Platte city, in another township, to wit, Carroll township.

Keim objected to this removal, but was overruled, and the cause removed. The trial took place at Platte city, both parties appearing; and Keim moved to dismiss the case, because the justice (as he said) had no right to remove the cause; his motion was overruled, the trial took place, and a verdict was found and judgment rendered for Daugherty. From this judgment Keim appealed.

Afterwards, on the second day of the July term of the Circuit Court of Platte county, Daugherty filed a transcript of the proceedings before the justice of the peace in that court, and moved to affirm the judgment of the justice.

The Circuit Court affirmed the judgment of the justice. Keim then filed his affidavit, stating that some months before he had applied to the justice, before whom the case was tried, for the papers in the case, that he might take them to the Circuit Court, and that he was informed by the justice that it was his (the justice's) duty to file them, and that he would attend to it, and that he, Keim, on the faith of this promise of the justice, had trusted to him to file the transcript.

There was no bill of exceptions taken to preserve either this or another motion to set aside the affirmance of the judgment of the justice by the Circuit Court. But the 27th section of the act of 1839, p. 48, makes it the duty of the appellant himself to file the transcript of the justice's proceedings on or before the return day of the appeal, and if he fail to do so, it gives to the appellee the right to produce the transcript, and to the court the power to affirm the judgment, unless appellant filed a transcript before motion to affirm is made, or the appellant showed good cause for his default. The cause of his default, even if it had been shown in a bill of exceptions, is not good.

Two other reasons for a reversal of the judgment of the Circuit Court have been urged —

Keim vs. Daugherty.—Tunstall vs. Hamilton.

1. That a justice for Preston township cannot try a cause of forcible entry and detainer in Carroll township.

2. The 27th section, above-cited, gives to the Circuit Court the power to affirm *only*, and that court has ordered a writ of restitution and execution.

To begin first with the second reason for reversing the judgment, the 41st section of the act of 1839, p. 49., declares, that "the Supreme and Circuit Court respectively shall have power to issue writs of restitution or re-restitution, or executions with clauses to that effect, as occasion may require, to enforce their judgments in any case arising under this act, or the act to which this is an amendment. By the 34th section of the same act it is provided, that when the appeal is *dismissed*, a certificate of such dismissal shall be made and certified to the justice, who shall therefore issue execution without delay. This is the only case in which the Circuit Court is authorized to send the case back to the justice, and upon the principle that, *expressio unius est exclusio alterius*, it may be inferred, that in every other case the Circuit Court must retain the cause, and carry its judgment into effect.

The action of forcible entry and detainer, or of forcible detainer, may be tried before any justice of the peace of the county in which such act is committed. (See the act concerning forcible entry and detainer, in Digest of 1835, p. 278, sec. 5.) And the act to establish justices' courts, &c., declares, that every justice of the peace shall have jurisdiction co-extensive with the county for which he shall be elected or appointed; (Digest of 1835, p. 348, art. 1, sec. 6;) so that it appears the Circuit Court committed no error, either in refusing to set aside the judgment of the justice, because the cause was tried in Carroll township, or because it issued a writ of restitution and execution.

The judgment is, then, affirmed.

TUNSTALL vs. HAMILTON.

1. Where suit was commenced in the St. Louis Court of Common Pleas, prior to the passage of the act of January 16, 1843, concerning courts, providing, that "after the issues shall have been made up, the suits shall stand continued until the second term," (Session acts of 1842-3, p. 58,) and, after the passage of that act, the plaintiff amended his declaration by filing additional counts, it was held, that the defendant was entitled to a continuance, although the 9th section of the act of January 21, 1841, establishing the Court of Common Pleas, (Session acts of 1840-'41, p. 51,) made such cases triable at the first term, where personal notice had been served on the defendant.
2. Where the plaintiff amends his declaration in a matter of substance, the defendant will be entitled to a continuance.—See *Risher vs. Thomas*, 1 Mo. Rep., 529, 2d edit.; *Demsey vs. Harrison & Glasgow*, 4 *Ibid.*, 270.
3. Where a continuance is refused a party who has used due diligence to procure testimony, and has failed, such refusal will be good ground for reversing the judgment.—See *McLane vs. Harris*, 1 Mo. Rep., 501, 2d edit.; *Riggs vs. Fenton*, 3 *Ibid.*, 28; *Moore & Porter vs. McCullough*, 6 *Ibid.*, 444.

Tunstall vs. Hamilton.

ERROR to the Court of Common Pleas of St. Louis County.**DRAKE and RANNELLS, for Plaintiff in Error.**

The court below erred in refusing the continuance demanded, and in forcing the defendant below to a trial, because the plaintiff below had been allowed, at the term when the case was called for trial, to amend his declaration.

The principle on which it is contended there was error in this proceeding of the court, is settled in the case of *Risher vs. Thomas*, 1 Mo. Rep., 739, and afterwards affirmed in *Dempsey vs. Harrison & Glasgow*, 4 Mo. Rep., 267.

WALKER, for Defendant in Error.

1. There was no error in refusing a continuance at the February term.
2. There was error in the decision of the court, sustaining the demurrer to the three special counts in the declaration.

TOMPKINS, J., delivered the opinion of the Court.

Robert Hamilton sued Warrick Tunstall, in the Court of Common Pleas of Saint Louis county, at the November term, 1842. The declaration contained three special counts on a note, and the common counts. Judgment was given for Hamilton, to reverse which Tunstall prosecutes this writ of error.

At the November term the defendant, Tunstall, demurred to the three special counts, and pleaded the general issue to the common counts. The demurrer was sustained. At the February term the plaintiff, Hamilton, filed three amended counts, by leave of the court, and to them the defendant pleaded the general issue; and the court gave a judgment for the plaintiff at that term.

The bill of exceptions shows, that, after the plaintiff filed his amended counts at the February term, the defendant, Tunstall, moved for a continuance of the cause, and that the court overruled his motion. Tunstall excepted to the opinion of the court in overruling his motion; a new trial was moved for, and the motion was overruled, and exception to such overruling taken by the defendant.

By the act establishing the Court of Common Pleas of St. Louis county, (see laws of 1840), all causes were to be tried at the return term thereof; but the act of 16th of January, 1843, p. 57 of pamphlet act, provides that issues shall be made up in all suits brought in the Court of Common Pleas, as provided by the act of the 17th of March, 1835, in relation to practice at law (that is, at the return term of the writ); and, after the issues are made up, shall stand continued to the second term.

The amended counts were filed in this case some time after the act of 16th of January, 1843. The suit stood then, after the counts were amended, as a return to that term; or, rather, had a stronger claim to a continuance than a return to that term; for the defendant must have been served with notice of a suit returned to that term fifteen days before the return day of such term; and whatever rules the Court of Common Pleas might have made for itself, under the act of assembly,

Tunstall vs. Hamilton.—Snowden et al. vs. J. B. and P. G. Camden.

as it stood previous to the 16th of January, 1843, after the passage of that act, that court was bound by the general law of the land.

Where a party uses due diligence to procure testimony, and fails, and a continuance is refused him, the court will, for that cause, reverse the judgment, and remand the cause for a new trial. (*McLane vs. Harris*, 1 Mo. Rep., 501, of the newly-printed work, and p. 701 of the old.) To the same purpose see *Riggs vs. Fenton*, p. 28, and *Moore & Porter vs. McCullough*, 6 Mo. Rep., 444. After the issues are made up, the statute now allows a continuance, to enable the parties to prepare themselves with evidence for the trial of the cause. The pleadings in this case were amended, as above observed, after the passage of the act of the 16th of January, 1843, at the February term; and a doubt might well arise whether, under a strict construction of the law, the defendant would have been obliged to plead before the term next succeeding the February term (at which the amendments were made), but there cannot be the slightest pretext, under the act of the 16th of January, 1843, to force him to trial after the plaintiff had amended his declaration. In the case of *Risher vs. Thomas*, 1 Mo. Rep., 739, and in that of *Dempsey vs. Harrison & Glasgow*, 4 Mo. Rep., 267, this Court decided, where a demurrer was withdrawn at the trial term, and a replication filed, that the defendant was entitled to a continuance, and that a refusal to grant it was erroneous; and for that reason reversed the judgment of the inferior court. For much better reason, when the declaration is amended, and a new cause of action is, or may be, set up, the continuance ought to be granted.

For the reason that a continuance was refused to the defendant in this cause, the judgment of the Circuit Court is reversed, and the cause remanded.

SNOWDEN ET AL. vs. J. B. & P. G. CAMDEN.

Plaintiffs sued out a *scire facias* on a recognizance of appeal. At the return term, the Circuit Court permitted the original judgment and recognizance to be amended on motion of the plaintiff. The defendants then plead *nut tiel record*, and issue was joined thereon. Upon the trial of this issue the defendants objected to the reading of the judgment and recognizance, because the amendments were improperly made: *Held*, That the objection was not taken in time. The defendants should have objected at the time the amendments were made, and saved their objections by a bill of exceptions.

ERROR to Carroll Circuit Court.

STRINGFELLOW, for Plaintiff in Error.

1. The court erred in admitting as evidence the judgment in favor of J. B. and M. Camden & Co., and the amendment thereof; the amendment being made in this case, not only after one term, but after a lapse of two years from the judgment.

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2. The court erred in admitting in evidence the recognizance to J. B. & P. Camden & Co., with the amendment thereof, for the same reason as above, and with greater force, if possible, securities thus being made responsible to strangers. We insist that this is error.—See *Ashley vs. Glasgow*, 7 Mo. Rep., 320.

3. The certified copy of the judgment of the Supreme Court was not evidence. The whole record of the Supreme Court was necessary to show jurisdiction of the cause, and it should have been certified: a mere part thereof is no evidence, and the copy of the judgment ought not to have been received.

4. There being no legal evidence, the court erred in overruling the motion for a new trial.

5. The court erred in overruling motion in arrest of judgment.

LEONARD and BAY, for Defendants in Error.

1. The points relied on by the plaintiffs in error, in relation to the amendments and the transcript of the judgment of the Supreme Court, do not arise in this cause. The only plea is, *nul tiel record*; and, of course, the only matter in issue was, whether there was such a record as the plaintiff below alleged. The propriety or impropriety of the amendments, and the sufficiency of the transcript, were not in issue; besides, the plaintiffs in error did not except to the judgment of the court in permitting the amendments to be made, but on the trial excepted to the judgment of the court in permitting the amendments to be read in evidence.

2. Admitting that the question of the propriety of the amendments was involved in the issue, the defect in the record and *scire facias* could be supplied, and the amendments made under the provisions of the 7th and 8th secs. of the 6th art. of the act relating to practice at law, R. S., 1835, p. 468, 469; *Hunt vs. Reynolds*, 3 Cowen, 42; *Mitchelton vs. Sparks*, 1 Scammon, 122.

NAPTON, J., delivered the opinion of the Court.

This was a *scire facias* on a recognizance entered into by the plaintiffs in error to John B. & Peter G. Camden & Co. The *scire facias* recited the original judgment, the recognizance, and the judgment of the Supreme Court on the appeal. The writ was served upon all the defendants; and at the return term thereof, the plaintiffs below asked leave to amend the record of the original judgment and recognizance, by inserting in the first line of said judgment the words, "John B. Camden and Peter G. Camden," instead of "J. B. and M. Camden;" and in the sixth line of said judgment, the word "defendants" instead of "defendant;" and the same in the tenth line. The plaintiffs also moved to amend the recognizance, by inserting the words "John B. Camden and Peter G. Camden," instead of "John B. and P. Camden and Co.," which amendments were made accordingly. The defendants pleaded *nul tiel record*, and on this issue the plaintiffs read in evidence a copy of the record of the Supreme Court, affirming the judgment of the Carroll Circuit Court, to the reading of which the defendants objected; but the court allowed the same to be read, and the defendants excepted, and saved their

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exceptions. The plaintiffs also read the original judgment and recognizance taken in said Carroll Circuit Court, with the amendments thereto, to which objections were made and overruled, and the opinion of the court excepted to.

The verdict was for the plaintiffs below, and the defendants moved for a new trial, and in arrest of judgment. These motions were overruled, and the cause is brought here by writ of error.

The errors assigned are, that the court below improperly allowed the record of the original judgment, and the amendments thereto, to be given in evidence. That the court also erred in permitting the amended recognizance to be given in evidence; and that it was also error to allow the record of the judgment of this court in evidence. The two first are objected to as inadmissible, because the amendments were improperly allowed; and the copy of the record of the Supreme Court is objected to, because it was not a full transcript of all the proceedings of said court in that cause, but a copy of the judgment only.

In relation to the two first errors, we observe, that the amended records given in evidence are not objected to because of any variance from the records set out in the *scire facias*, but because the amendments were improperly allowed. If the plaintiffs in error wished to have the opinion of this Court in relation to the propriety of the amendments, they should have objected to them at the time they were made. The bill of objections should have preserved this fact, and also the entire record of the proceedings on which the original judgment was founded, in order that we might examine whether such amendments were legally made. The amendments seem to consist entirely of a change of the names of the parties: whether such mistakes would be clerical, and therefore within the powers conferred by our statute (Rev. Code, 1835, p. 468, 469), or whether they affected the right of the parties, and therefore not amendable after the term, could only be seen by an inspection of the entire record. The point is not saved.

The same may be said in relation to the sufficiency of the record of the judgment of this Court. The record of this judgment corresponds with the one declared on, and it was clearly sufficient on the plea of *nul tiel record*. If the *scire facias* was defective in not setting forth all the proceedings of the said court previous to the judgment, the defendants should have demurred: the defect certainly is not such an one as can be taken advantage of on writ of error.

Judgment affirmed.

Martin vs. Hagan.

MARTIN vs. HAGAN.

The evidence in this cause not being preserved in a bill of exceptions, the judgment was affirmed.

ERROR to Monroe Circuit Court.

KIRTLEY, for Defendant in Error.

1. If defendant's witnesses testified in the manner they are made to speak in the bill of exceptions, this Court can never discover that the circuit judge erred in his finding and judgments.

2. The amount in controversy being trifling in comparison to the costs that will be incurred in the further litigation of this suit, this Court will not disturb the judgment, unless the error be very clear and manifest.

3. The form of the judgment works no injury, and at all events was not complained of in the Circuit Court, and therefore no ground of reversal here.

4. The sufficiency of the assignment of the bond was not objected to below, and not mooted, and if insisted, it might have been shown that Wilkinson was the only living administrator, or some other sufficient reason proved to support that assignment.

NAPTON, J., delivered the opinion of the Court.

This cause is brought here by writ of error to the Circuit Court of Monroe county. It appears from the record, that Hagan brought suit against the appellant, Martin, before a justice of the peace, and recovered a judgment; that Martin appealed to the Circuit Court, where the case was submitted without a jury, and Hagan again recovered a judgment for \$17 and costs. There was a motion for a new trial, which was overruled, and exceptions taken to the overruling of said motion; but the evidence at the trial was not preserved by bill of exceptions, though it is spread upon the record by the clerk. Under such circumstances, as the testimony is not properly before this Court, we cannot see that any error was committed by the Circuit Court in overruling the motion of the plaintiff in error for a new trial, and the judgment of the Circuit Court is therefore affirmed.

Ser vs. Bobst.

SER vs. BOBST.

1. Where judgment by default has been rendered against the defendant in an action of forcible entry and detainer, he will not be entitled to an appeal, although he first moves to set aside the judgment by default, and such motion is overruled.— See act of January 28, 1839, concerning "forcible entry and detainer," sec. 11 session acts of 1838, '39, p. 47.
2. But where, in such case, the appeal has been allowed by the justice, the cause will not be dismissed from the docket of the Circuit Court if the judgment against the appellant was improperly given, as where he has not been served with process as the law requires. In such case it is the duty of the Circuit Court to try the cause *de novo*, without regarding any error or imperfection in the proceedings before the justice.
3. Where process may be served by leaving a copy of the summons "*at the usual place of abode*" of the party with some white member of his family, "*above the age of fifteen years*," a return that the copy was left "*at the dwelling-house*" of the party, "*with his wife*," and the same read to her, is insufficient. The law will not presume that "*the dwelling-house*" of the party was his "*usual place of abode*," nor that his wife was "*above the age of fifteen years*."
4. Where, in an action of forcible entry and detainer, a judgment by default has been improperly entered against the defendant, the proper course to be pursued by the defendant seems to be to apply to the Circuit Court under the 37th section of the act of January 28, 1839, concerning forcible entry and detainer, to compel the justice to allow the appeal.

APPEAL from Montgomery Circuit Court.

CAMPBELL, for Appellant.

TOMPKINS, J., delivered the opinion of the Court.

This was an action of forcible entry and detainer, brought by Henry Bobst before a justice of the peace of Montgomery county. Judgment by default was given before the justice, against the defendant, Adam Ser. To reverse this judgment, this appeal is taken.

When the cause came into the Circuit Court, on the appeal, the plaintiff, Bobst, moved to dismiss it, because the judgment of the justice was by default, and no motion was made by the appellant to set the same aside before the appeal was taken.

The 11th section of the act of 28th of January, 1839, p. 47, gives to the party aggrieved by the judgment of the justice, in any case of forcible entry and detainer, or unlawful detainer, an appeal, except from a judgment of non-suit, or by default. I am not informed of any law which allows the appeal from a judgment by default, in this action, in case the appellant move the justice to set the same aside before the appeal is taken. The appeal, however, was allowed by the justice, and taken by the defendant. Before the cause was dismissed from the docket of the Circuit Court, that court should have examined whether a judgment were correctly given by the justice, or rather it was the duty of the counsel of the appellee to show to

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the Circuit Court that such judgment was correctly given. The 8th section of the act concerning forcible entry and detainer, p. 278 of the Digest of 1835, directs the summons to be served, by reading the complaint and summons to the defendant, or delivering him a copy thereof, or by leaving such copy at his usual place of abode, *with some white member of his family above the age of fifteen years, and explaining to such person the contents thereof.*

The return in this case is—"Executed the within, by leaving a copy of the within at the dwelling-house of the said Adam Ser, with his wife, and reading the same to his wife, on the 20th day of February, 1843."

It may be admitted, that by the words, "the within," used in the return, the constable intended to say the copy of the summons and complaint. A man may have several dwelling houses, some of which may be rented. It would have been better to have returned the copy left at his "*usual place of abode*," as in the law. We may intend the defendant's wife to be "*some white member of his family*," although man and wife sometimes live apart; but it cannot be presumed that a man's wife is necessarily above *fifteen years of age*. The law allows marriages at an earlier age. The justice of the peace, then, had not in this case taken jurisdiction of the person of Adam Ser, the defendant;—then he entered the judgment by default erroneously. The regular course to be pursued by the appellant would, perhaps, have been, (had the justice not allowed the appeal,) to apply to the Circuit Court under the provisions of the 37th section of the act of 28th January, 1839, p. 49, to compel the justice to allow the appeal. But this cause had found its way into the Circuit Court, and it is evident that the justice cannot give judgment by default on such a return. The Circuit Court should, then, without regarding any error, defect, informality, or imperfection, in the proceedings of the justice, have proceeded to hear, try and determine the same anew, as if it had originated in that court. (See sec. 36 of said act, p. 49.) The appellant, by bringing up the cause, had dispensed with the necessity of a regular summons before the justice. The Circuit Court committed error in dismissing the cause from its docket, and, for this reason, its judgment must be reversed, and the cause remanded.

BRAND vs. VANDERPOOL.

1. A. purchased of B. a tract of land, and executed his notes for the purchase money, payable in instalments, the last due 9th of August, 1840; and at the same time B. executed his bond for a conveyance, whenever the purchase money should be fully paid. On the 25th of September, 1842, A. executed a new note to B. in lieu of the note given for the last instalment. On this note suit was brought, and A. contended that the payment of the purchase money and the making of the deed for the land were, by the terms of the bond, to be concurrent acts: *Held*, That whether the payment of the note due on the 9th of August, 1840, and the making of the deed,

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- were, by the contract, to be concurrent acts, was immaterial. The note sued on having been given in consideration of the cancellation of the note due on the 9th August, 1840, and having been executed after that note became due, and long after the execution of the bond for the conveyance of the land, it became payable independent of any covenants contained in that bond.
2. Where two covenants are independent of, and have no reference to, each other, the averment of the performance of one of them in a suit upon the other will be considered immaterial, and a plea traversing the performance will be bad on general demurrer.

APPEAL from Ray Circuit Court.

P. L. EDWARDS, for Appellant.

1. From the terms of the contract, the payment of the last instalment of the purchase-money, and the execution of the deed, are mutual and dependent agreements. — Sugden on Vendors, 245, 246; 1 Chitt. Plead., 353-5, and note 637; 1 Sand. Rep., 320, note 4; 2 *Ibid.*, 352, note 3; Bank of Columbia vs. Hagner, 1 Pet. Rep., 456.

I. Covenants are to be construed according to their evident sense and meaning; and their precedence or dependency does not depend upon their being prior or posterior in the instrument. — Cooke vs. Johnson, 3 Mo. Rep., 339; 1 Chitt. Plead., 353.

II. In cases of doubt, the courts incline to consider covenants as dependent; and if there is an agreement that one shall do an act, and that another shall pay money therefor, in general the doing of the act is a condition precedent. — Tidd's Practice, 383; 1 Pet. Rep., 451, *supra*.

2. The appellee can only place the appellant in default by executing a deed according to the terms of the bond to convey, or offering and showing his readiness and willingness to do so. — Sugden on Vendors, 283, top, and note 158; Green vs. Reynolds, 2 Johns. Rep., 203; Cunningham vs. Morrell, 10 *Ibid.*, 203; Wilcox vs. Ten Eyck, 5 *Ibid.*, 78; Parker vs. Parmlee, 20 *Ibid.*, 130.

3. The independency of the covenants to pay the prior instalments of the purchase money does not authorize any conclusion prejudicial to the appellant as to the last instalment. — Cunningham vs. Morrell, *supra*; Green vs. Reynolds, *supra*; Johnson vs. Wygant, 11 Wend. Rep., 48; 1 Amer. Digest, sec. 3, p. 100.

4. The nature of the appellant's defence is not changed or affected by the contract being contained in several instruments. — Hunt vs. Livermore, 5 Pick., 395.

5. Under the issue, the appellant should have been let in to his full defence. — 1 Chitt. Plead., 517, and note *p*; Lindo vs. Gardner, 1 Cranch, 343, and appen. 465.

6. The bill of discovery was filed as soon as its necessity was ascertained, and should have been allowed. — Dempsey vs. Harrison & Glasgow, 4 Mo. Rep., 267.

7. The court erred in giving judgment while the bill of discovery remained undisposed of.

8. The judgment is informal and uncertain: it is for no particular amount.

9. The bill of discovery filed by the defendant below, against the plaintiff below, yet remains upon the record undisposed of.

Brand vs. Vanderpool.

DUNN, for Appellee.

1. The want of any allegation of diligence by the defendant below, appellant here, is fatal to his petition for discovery in the case disclosed.
2. It is not averred that the facts are within the knowledge of the plaintiff below, appellant here.
3. The petition charges no demand of a deed by the defendant, or refusal by the plaintiff to execute it.
4. The title to the land is not impeached : no incumbrance is complained of, nor is insolvency alleged.
5. The bond referred to, and the petition for discovery, both show that the payment of the money was a condition precedent to the execution of the deed.
6. According to the original transaction, the parties would have been left to pursue their remedies upon the instruments taken by them respectively.
7. But the note sued on was given upon a settlement made more than two years afterwards ; and no fraud or mistake being charged, the defendant cannot go behind that settlement.
8. The facts stated in the petition for a discovery, if true, constitute no bar to the action ; the court, therefore, committed no error in refusing the order requiring the plaintiff to answer it.

TOMPKINS, J., delivered the opinion of the Court.

Meaders Vanderpool commenced an action by petition, in the Circuit Court of Ray county, against George W. Brand, on a note made by Brand to Vanderpool for \$830 67 : judgment being given for Vanderpool in the Circuit Court, Brand, to reverse that judgment, appeals to this court.

The defendant pleaded *nil debit* to the petition in debt, and then filed a bill for a discovery, under the 10th section of the 4th article of the act to regulate practice at law, stating that, on the ninth day of August, 1838, he purchased from said plaintiff, Vanderpool, several tracts of land, which said purchase was made for a price, and on terms expressed in a bond, for a title then made and delivered to said defendant by said Vanderpool ; that the said purchase money was to be paid to said plaintiff, by the said defendant, in instalments ; and the last instalment was for the sum of six hundred and eighty-three dollars, and to be paid on or before the ninth day of August, 1840, and for which the defendant executed to the plaintiff his promissory note, according to the said terms ; and the said plaintiff was bound by said bond to execute to this defendant a good and sufficient deed, with general warranty, &c., whenever said Brand should fully pay and satisfy the said purchase money. The defendant further represents, that, on the 25th day of September, 1842, on accounting and settling with said plaintiff for interest due on said last instalment, (all previous instalments being paid,) this defendant was found to be indebted to said plaintiff, on account of said last instalment, in the sum of \$830 67 ; and for this sum the defendant executed to the plaintiff his promissory note, on which this suit is brought ; that the payment of this last sum of money, &c., the

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last instalment by the defendant, and the making of the deed, were, by the terms of the bond, to be concurrent acts, to be performed at the same time.

The bond for a title is also set out as an exhibit, and bears the same date as the note above mentioned, as given for the last instalment to be paid on this land, to wit, the 9th of August, 1838, and, it will be recollected, became due on the 9th of August, 1840. More than two years afterwards, to wit, on the 25th day of September, 1842, the note here sued on was given to the plaintiff, in consideration of the principal and interest of the note before mentioned. Admitting, for the sake of argument, that the said note made on the 9th of August, 1838, and becoming due on the 9th of August, 1840, should, by the terms of the bond, be paid then only, when the plaintiff conveyed the land, it is difficult to conceive how that condition could be transferred to a note made more than two years after the first note became due, and four years after the execution of the bond for a title. The Circuit Court overruled the motion of the defendant to compel the plaintiff to answer this bill of discovery. It is absurd to say, that the money due on this note was not to be paid till a title to the land was made, for which land a title-bond had been given four years before the making of the note. Common sense would say, from the defendant's own statement of this case, that the note here sued on was given in consideration of the first note given up to the defendant to be cancelled, or otherwise annulled, at his will. Where two covenants are independent of, and have no reference to, each other, the averment of the performance of one of them in a suit upon the other will be considered immaterial; and a plea, traversing the performance, will be bad on general demurrer. — *Simonds' Administrator vs. Beauchamp*.

The Circuit Court committed no error in refusing to rule the plaintiff to answer this bill for a discovery.

The judgment is therefore affirmed.

LEVY vs. HAWLEY.

1. Where several are sued on a joint and several contract, one of the defendants will not be allowed to appear and testify on behalf of the plaintiff, against the consent of the other defendants, for he is decidedly interested in the event of the suit, in diminishing his own liability.
2. The 16th and 17th section of the fifth article of the act relating to justices' courts, (Rev. Stat., 1835, p. 361,) allowing a party, in certain cases, before a justice of the peace, to summon the adverse party as a witness, and in the event of his not appearing to testify himself, do not authorize a plaintiff to summon a defendant to testify against his co-defendants. It was not the intention of the statute to suffer one defendant to prejudice by his own oath, or by his disobedience to a subpoena, the right of a co-defendant.

APPEAL from Buchanan Circuit Court.

LEONARD, for Appellant.

1. James Edgar was an incompetent witness for the plaintiff below.

1st: He was a party to the record.— *The Commonwealth vs. Marsh*, 10 Pick. Rep., 38; *Supervisors of Chinango vs. Berdall*, 4 Wend. Rep., 453–57; *Lampton vs. Lampton's Executors*, 6 Mo. Rep., 619.

2d: He was directly interested in holding Levy jointly liable with himself to the payment of the note.— *Brown vs. Brown*, 4 Taunt. Reports, 752; *Ripley vs. Thompson*, 22 Eng. Com. Law Rep., 89; *Marquand vs. Webb*, 16 Johns. Rep., 89; *Miller vs. Hale*, *Dudley's Rep.*, 119, cited in 3 Phil. Ev., 1521.

2. The finding of the court was palpably against the evidence.

The note was not executed in the name of any firm of which the appellant was a partner, nor was the money for which the note was given borrowed for Edgar & Levy, although a part of it was subsequently applied to their use.— *Gow on Partnership*, 38–40; *Bevan vs. Lewis*, 1 Sim. Rep., 376; *Jaques vs. Marquand*, 6 Cow. Rep., 497.

HICKMAN, for Appellees.

1. James Edgar was a competent witness.— See *Gow. on Part.*, 201; 6 Mon., 304; Mo. Stat., 361.

2. Edgar & Levy having received the money, and applied it to the partnership concern, they are liable.— See 16 Wend., 505; *Bascom vs. Young*, 7 Mo. Rep., 1; *Potter vs. Dillon*, 7 Mo. Rep., 228.

NAPTON, J., delivered the opinion of the Court.

Hawley sued Levy, John and James' A. Edgar, before a justice of the peace, on the following note:—"Six months after date, we promise to pay Stephen Hawley, or order, one hundred and fifty dollars, for value received, bearing ten per cent. interest per annum until paid.—18th May, 1841."

(Signed)

"J. & J. A. EDGAR & Co."

Levy and James Edgar were served with process, but John Edgar was returned *non est inventus*. A trial was had before the justice, and the plaintiff obtained a judgment, from which Levy appealed to the Circuit Court, and the other defendants not joining in the appeal, there was an order of severance. The case was submitted to the court, and the court found for the plaintiff, and gave judgment against Levy for the amount of the note with interest.

On the trial in the Circuit Court, James Edgar, against whom the judgment had gone before the justice, was produced as a witness for the plaintiff. Objections were made, the objections overruled, and exceptions taken to the opinion of the court.

Levy vs. Hawley.—Palmer vs. Hunter.

All the evidence is spread upon the record by a bill of exceptions; but as we think the court erred in admitting Edgar to testify, it is unnecessary to give any opinion in relation to the verdict.

The witness was directly interested in the event of the suit; for by procuring a judgment against the defendant, he thereby diminished his own liability. He was, in that event, entitled to contribution.—*Morrell vs. Jones*, 7 Bingh., 395.

The provisions of our statute, (Rev. Code, 361,) allowing a party, in certain cases, before justice of the peace, to subpoena his adversary, and in the event of his not appearing to testify himself, do not embrace a case like this. It was not the design of the statute to suffer one defendant to prejudice, by his oath or his disobedience to a subpoena, the right of a co-defendant.

Judgment reversed, and cause remanded.

PALMER vs. HUNTER.

1. A declaration in slander, charging the plaintiff with swearing to a lie, as a witness in a proceeding before a justice of the peace, in which it is not stated that the justice had jurisdiction or power to administer the oath, or that the testimony was given upon a material matter, although had on demurrer, is good after verdict.
3. Where the issue joined is such as necessarily requires proof of facts defectively stated or omitted in the declaration, and without which proof it is not to be presumed either that the judge could direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission, is cured by verdict.
3. A count in slander stating the actionable words to be that plaintiff "*swore to a lie*," with an averment that defendant meant thereby, and was so understood, to charge the plaintiff with the crime of perjury, *but without any colloquium*, is bad.
4. A transcript of proceedings had before a justice of the peace who is out of office, certified by the justice in possession of the docket, is evidence of such matters as are properly on the docket. But where the party against whom the transcript is offered objects to its admission on account of its containing irrelevant matter, he should point out the same, and ask the court to exclude the exceptionable matter. It will not do to object in general terms to the rendering of the transcript.—See act of February 1, 1839, concerning "Evidence," session acts of 1838, '39, p. 43.

APPEAL from Clinton Circuit Court.

WILLIAM M. CAMPBELL, for Appellant.

1. The introduction of the transcript of what is called the docket of justice Funkhouser, was illegal and improper, because it was not properly certified and authenticated, and because it contained much extraneous and irrelevant matter, that was calculated to mislead the jury. This was good cause for a new trial.—Rev. Stat. Mo., p. 347, sec. 32, p. 419, sec. 9; 7 J. J. Marshall's Rep., p. 415, 421, 423.

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2. There was no evidence given on the trial that the "Hunter" of whom Palmer spoke the slanderous words, respecting which the witnesses testified, was Joseph Hunter, the plaintiff in this suit, and the innuendos of the declaration are entirely unsupported, and for this reason a new trial should have been granted.

3. There was no evidence whatever given to sustain the third and fourth counts in the declaration, and as the verdict was general, a new trial should, for that reason, have been awarded.—11 Wend., 596.

4. The declaration of the plaintiff is materially defective. It does not allege that Funkhowser, the justice, had a right to administer the oath to Hunter, nor that he had jurisdiction of the cause which was on trial; nor does it state that the matters sworn to by Hunter were material to the matter on trial before the justice when Hunter testified before him, and the declaration is otherwise defective, and for that reason the judgment should have been arrested.—See 5 Mo. Rep., p. 21, 24, 25, p. 51, 53; Roscoe's Cr. Evidence, 673, 680; Selwyn's Nisi Prius, 427, 434, 435, note; 4 Mo. Rep., 46-48.

5. The third count of the declaration is materially deficient and insufficient, because it does not, in any manner, refer to any trial or judicial proceeding, nor connect the false swearing charged with any such trial or proceeding; and as a general verdict was rendered, the judgment should have been arrested for this reason.—6 Term Rep., 691; 5 Cow. Rep., 503; 1 Caines' Rep., 317; 3 Cow. Rep., 231; 4 Digest N. Y. Rep., 1032-1035, 1040, 1045; 11 Wend., 596; *Ibid.*, 38-40.

LEONARD, for Appellee.

1. The judicial proceeding before the examining justice was relevant to the issue, and the certified copy competent evidence of such proceeding.—Session acts of 1838 and '39, p. 43, title, "Evidence," sec. 14; Rev. Stat. of 1835, title, "Justices of the Peace," p. 347, sec. 31, 32; *Bryan vs. Wear and Hickman*, 4 Mo. Rep. 110.

2. The motion in arrest of judgment was properly overruled.

1st. The fourth count is admitted to be good, and where there are several counts in a declaration, and entire damages are given, the judgment will not be arrested, although some of the counts may be bad.—Rev. Stat. of 1835, p. 470, sec. 4 of 7th art. of the act relating to "Practice at Law."

2d. All the counts in this declaration are, in fact, good after verdict. The fourth count is admitted to be good.

The third count contains an averment that the defendant, in uttering the words laid, intended, and was understood by his hearers, to impute to the plaintiff the commission of perjury, and this is sufficient to support the count, even against a demurrer.—*Goodrich vs. Woolcott*, 3 Cowen's Rep., 239; *Woolnoth vs. Meadows*, 5 East Rep., 463; *Cornelius vs. Van Slyck*, 21 Wend. Rep., 70; *Peake vs. Oldham*; 1 Cowper's Rep., 272.

The first count charges words that are actionable without the aid of the preliminary averment of a judicial proceeding and colloquism in relation thereto. Much more is the count good, when aided by such averment and colloquism.—Neven

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vs. Munn, 13 Johns. Rep., 48; *Gillmore vs. Lowell*, 8 Wend. Rep., 573; *Roberts vs. Camden*, 9 East. Rep. 96; *Patton vs. Ward*, 3 Caine's Rep., 73.

The second count charges the words to have been spoken of the plaintiff, in a conversation about the judicial proceeding and testimony of the plaintiff, alleged in the preliminary part of the first count, and is good after verdict, without an averment of the jurisdiction of the justice, or of his power to administer the oath, or of the materiality of the matter sworn.—Rev. Stat. of 1835, title, "Practice at Law," p. 468, sec. 7, clause 9; *Paryburn vs. Ramsey*, 11 Johns. Rep., 142; *Neven vs. Munn*, 13 Johns. Rep., 58; *Chapman vs. Smith*, 13 Johns. Rep., 80; *Sherwood vs. Chace*, 11 Wend. Rep., 38; *Crookshank vs. Gray*, 20 Johns. Rep., 344.

3. There are no sufficient grounds in the record for a new trial.

Admitting, for the present purpose, that when there are several counts in a declaration, some good and others bad, and a general verdict, the court will grant a new trial, if there be not sufficient evidence applicable to the good counts to uphold the verdict, yet here the first count is good without any preliminary averment of a judicial proceeding; and after verdict, both the first and second counts are certainly good, when aided by such averment, although defectively stated, and there is ample evidence in the record, applicable to each of these counts, to uphold a verdict found by a jury and approved by the Circuit Court.

NAPTON, Judge, delivered the opinion of the Court.

This was an action of slander commenced by Hunter against Palmer, in the Circuit Court of Clinton County, for words spoken. The declaration contained four counts. The first count, after reciting that there had been a prosecution pending in Clinton county, before one Abraham Funkhouser, a justice of the peace, against William Sally, for larceny, and that on such trial said plaintiff was examined as a witness on oath, and gave testimony in behalf of the defendant, proceeds to state a colloquium about this trial and concerning the evidence given by him on this trial, and avers, that in this conversation the defendant uttered of the plaintiff these false and scandalous words: "Hunter swore a *point* blank lie to clear William Sally of stealing honey."

The second count, after stating the colloquium as in the first count, charges the words spoken to be—"Joe Hunter swore a barefaced lie on Sally's case."

The third count contains no colloquium, and lays the actionable words to be, "Hunter swore a lie," with an averment, that the defendant meant thereby, and was understood by the by-standers, to charge the plaintiff with the crime of perjury.

The fourth count contains no averment about the trial before the justice, or the evidence thereon, and lays the words spoken to be, "He (the plaintiff) committed perjury."

Defendant pleaded not guilty, and the statute of limitation: upon these issues the parties went to trial, and a verdict was found for the plaintiff, and his damages assessed at nine hundred and forty-six dollars. Motions for a new trial and in arrest of judgment were made and overruled, and exceptions taken.

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The bill of exceptions contains the testimony.

N. Henderson testified that he heard defendant say, that "William Sally had stolen his (defendant's) honey; and that he had prosecuted Sally; and that Hunter swore a lie to clear Sally."

J. H. Henderson stated, that he had heard defendant say, in reference to the trial of Sally before the justice, that "Hunter had sworn a barefaced lie, in behalf of William Sally, to clear him."

Sebree, a third witness for the plaintiff, heard defendant, between the 10th and 20th of September, 1840, say, that "Sally was sworn clear, and Hunter was a witness; that he had swopped farms with Hunter, and Sally had stolen his honey; that he had prosecuted Sally, and he was sworn clear; that he would never again prosecute a man for stealing, as there was no law for convicting thieves; and that if a man were to steal his horse out of his stable, he would not prosecute him."

Williamson, another witness, heard defendant say, "Hunter had sworn a lie to clear William Sally, and he would like to be sued by Hunter."

The plaintiff then offered to read a transcript of the docket of the justice, *A. Funkhouser*, before whom the trial of Sally was had: this was certified by *John Patton*, another justice, to be a true and perfect transcript of the docket of said *Funkhouser*, transferred to him by the clerk of the County Court of Clinton. To this, objections were made, but the objections were overruled, and the said transcript read in evidence.

This transcript contained, in addition to such matters as were properly entered on the docket, the written testimony of all the witnesses on Sally's trial, and amongst others, the testimony of *Hunter*, and of the accused, *Sally*.

The principle errors assigned and insisted on in this Court, are—

1st: That the judgment should have been arrested, because the colloquium in the two first counts does not contain any averment that the justice, before whom the trial of Sally took place, had any jurisdiction of the case, or power to administer an oath, and because there is no averment that the oath was taken in any matter material to the issue; and that the third count does not set forth actionable words.

2d: That the verdict should been set aside, because the three first counts are bad, and no proof given to sustain the fourth count and a general verdict.

3d: That a new trial should be granted, because of the admission of the transcript of the justice's docket, containing, as it did, irrelevant and illegal matter, calculated to have a material influence on the jury in fixing their verdict.

We will first consider the sufficiency of the declaration. The two first counts are bad on demurrer. They contain no allegations that the justice had jurisdiction or power to administer the oath, nor any allegation that the oath was taken in relation to any matter material on the trial. We are of opinion, however, that these defects are cured by verdict. When the issue joined is such as necessarily requires proof of facts, defectively stated or omitted in the declaration, and without which proof it is not to be presumed either that the judge could direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission is cured by verdict. (1 Saund., 228, and note 1.) In *Rushton vs. Aspinall*, (Doug., 683,) Lord Mansfield states the rule to be, that where the plaintiff has

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stated his ground of action *defectively*, it is a fair presumption, after a verdict in his favor, that all circumstances necessary, either in form or substance, to *couple the title so imperfectly stated*, must have been proved at the trial, or he could not have recovered. But where he altogether omits to state any title or ground of action, it cannot be presumed he proved any on the trial, since he is bound to prove only what is laid in his declaration.

In the case of *Chapman vs. Smith*, (13 Johns. Rep., 80,) Judge Spencer applied these principles to a declaration in slander. In that case there was an averment, that the words were spoken of and concerning the evidence given by the plaintiff, and on a point material to the prosecution; but the judge, who delivered the opinion of the court, said: "If this averment had not been made, I should still be of the opinion, that after verdict we must intend that the words were spoken in relation to material evidence."

On the trial it would have been competent for either party to inquire in reference to what part of the evidence given the words were spoken; and if it had appeared that they were spoken of evidence wholly immaterial, it is not to be presumed that the plaintiff below would have obtained a verdict. The judge concluded that the principle applied with equal force to the objection; that there was no allegation of the power of the justices to administer an oath, and that such omission will be cured by verdict, as the plaintiff could not have succeeded without showing that the justices had such power.

The case of *Niven vs. Munn*, (13 Johns. Rep., 47,) was an action of slander for charging the plaintiff with swearing a lie, as a witness, on a trial in a justice's court. The declaration did not aver that the justice had jurisdiction, or that the testimony was given on a material point. The declaration was held good after verdict.

The third count, we think, is bad. There is no colloquium, and the words charged are, "that Hunter swore a lie," with an averment, that the defendant meant thereby, and was understood by the by-standers, to charge the plaintiff with perjury. The cases of *Goodrich vs. Wolcott*, (3 Cowen, 239,) and *Cornelius vs. Vanslyck*, (21 Wendall, 70,) are not like this. The offences charged, in those cases, were of a different character from that of perjury; and though it may not be easy to give any good reason why a charge of false swearing, when it is averred to be intended to convey the imputation of perjury, and to have been so understood by the hearers, is not as slanderous as when accompanied with words referring directly to some judicial proceeding, yet the distinction has been long acquiesced in and sanctioned by the former decisions of this Court. In the case of *Pellin vs. Bard*, (3 Caine's Rep., 73,) the words, "You swore a lie, for which you stand indicted," were held actionable, on the ground that the concluding words, "*you stand indicted*," implied that the false oath could have been none other than perjury, otherwise an indictment would not lie; but in *Stafford vs. Green*, (1 Johns. Rep., 505,) the words charged were, "He swore false before squire Andrews, and I can prove it," and the words were held not actionable, without a colloquium. The same principle is settled in *Brooker vs. Coffin*, 5 Johns. Rep., 189.

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For the same reason, the first and second counts would be bad without the colloquium.

Our statute (page 470, sec. 4,) provides, that where there are several counts in a declaration, and entire damages are given, the verdict shall be good, notwithstanding one or more of such counts may be defective. The motion in arrest of judgment was therefore properly overruled.

But if the three first counts in this declaration were bad, and no evidence to sustain the fourth count, the verdict should be set aside. As there was abundant proof to support the first and second counts, which we consider good after verdict, the insufficiency of the third count will not affect the verdict.

In relation to the admission of the transcript from the docket of the justice, before whom the trial of Sally took place, a reference to the 14th section of the act of 1838, '39, (page 43,) is sufficient to show that the transcript was properly admitted. That this transcript was not evidence, except of such matters as were properly on the justice's docket, is also well settled; but the defendant did not point out the objectionable parts of the transcript at the trial. So much of the transcript as contained the irrelevant matters complained of should have been excluded from the jury, and would have been, no doubt, if the defendant had called upon the court to do so, and pointed out the exceptionable matter. Not having done so in that court, it is too late to object here.

Judgment affirmed.

CHAMBERS vs. KING & TUNSTALL.

Where there is a special contract in force, a party cannot waive the contract and proceed upon a *quantum meruit*.

APPEAL from St. Louis Court of Common Pleas.

DRAKE and RANNELLS, for Appellant.

1. The court below erred in overruling the first instruction asked by the defendant, Chambers', counsel. No rule of law is better settled than that embodied in that instruction, viz., that when there is a written agreement, or indeed any special agreement, the party must recover on that, and cannot waive it and resort to a *quantum meruit*, or implied assumpsit.—*Champlin vs. Butler*, 18 Johns. Reports, 169; *Munford vs. McPherson*, 1 *Ibid.*, 414; 3 Mo. Rep., 366.

2. The second instruction, from the want of evidence to sustain it, was perhaps properly overruled.

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3. The court below erred in overruling the motion for a new trial. The verdict was clearly against the evidence in the cause, and whenever the jury have clearly erred and the court refuses a new trial, it is error.—4 Mo. Rep., 80.

It is error when the evidence *strongly* preponderates against the verdict.—3 Mo. Rep., Singleton vs. Mann, and 6 Mo. Rep., 61.

POLK, for Appellee.

The St. Louis Court of Common Pleas committed no error in this case by refusing a new trial.

1. Because the court did not err in refusing said instructions, as they are not according to law, and nothing in the case to warrant the giving of them.

2. The jury did not err in finding their verdict from the evidence.

The Supreme Court will not disturb the verdict of juries, except it be a flagrant case, which would justify their interference.—See the case of Lackey vs. Lane and McCabe, and the authorities there cited, 7 Mo. Reports, 220, which decision was made at September term, 1841, in the third judicial district at St. Louis.

NAFTON, Judge, delivered the opinion of the Court.

King & Tunstall sued the appellant, before a justice of the peace, on an account for professional services as attorneys at law, in a suit between appellant and the Union Fire Engine Company, which account was filed before the justice, and claimed fifty dollars. The result of the trial before the justice was a verdict and judgment for appellant, from which King & Tunstall appealed to the Court of Common Pleas, where, on a trial *de novo*, they obtained a verdict and judgment for thirty dollars.

The appellant applied for a new trial in the Court of Common Pleas, but was unsuccessful, and took his bill of exceptions, in which is preserved all the testimony given on the trial, and the instructions refused by the court.

It appears from this bill of exceptions, that the plaintiffs had instituted and faithfully prosecuted, on behalf of defendant, an action before a justice of the peace, to recover possession of a lot in St. Louis occupied by the Union Fire company; that, on appeal to the Circuit Court, the same plaintiffs diligently attended to the interests of their client, the appellant here, and in the opinion of the witnesses, who were also attorneys, the services of plaintiffs were well worth fifty dollars. It seemed also that the appellant succeeded ultimately in obtaining possession of the lot in dispute between him and the fire company, and that the fire company held as tenants under him, and in his settlement with an agent of the company he was allowed \$150, as the amount of fees paid to his lawyers, fifty of which the witness (who was the agent of the company) understood to have been paid to the appellees.

The appellant, on the trial, then produced on his part a paper, of which the following is the substance:—

“ST. LOUIS, Mo., January 9, 1838.

“Received of William Chambers twenty dollars, in full for our fee for the final recovery of the barn-lot formerly sold and conveyed by J. Colva to J. Braseau,

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and now claimed by the said Chambers, and occupied by G. F. Strother and the Fire Engine Company; to obtain possession of which, we engage to proceed under the statute of forcible entry and detainer or by ejectment, and pursue the case to final issue.

"KING & TUNSTALL."

The appellant also produced written receipts from A. L. Magenis and M. Blair, counsel, who had been employed in the same suit, from which it appeared, that one hundred dollars had been paid to Magenis, and thirty to Blair. These papers were all submitted to the jury without objection, and, together with the parol evidence relative to the value of the services of appellees, embraced all the evidence in the case.

Upon this state of facts, the court was called upon to say to the jury, that if they believed there was a written agreement between the parties, the plaintiffs must recover according to that agreement, and in no other way. This the court refused to do; the case went to the jury without instructions, and the verdict for the plaintiffs was for thirty dollars. We can perceive no ground upon which the verdict in this case can be permitted to stand. It is in direct opposition to the testimony. Whatever doubts might have arisen from the testimony of the agent of the fire company, must have been removed by the production of the receipts of Magenis, of Blair, and of King & Tunstall, which together proved that the sum claimed of the company had been actually paid by Chambers.

Whether these receipts were admissible or not, is no question here; they went to the jury without objection, and, indeed, appeared to constitute the evidence on which their verdict was found, for they allowed the appellees only thirty dollars of the fifty which they claimed, deducting, it is to be supposed, the twenty dollars for which Chambers produced their receipt. Had the court instructed the jury, as they should have done, that when there was a special contract, a party cannot proceed on a *quantum meruit*, this verdict would, in all probability, have been otherwise. The verdict should have been set aside.

Judgment reversed.

CAMPBELL vs. HEARD, REGISTER.

The lands and lots subject to entry at the office of the Register of Lands, under the 29th section of the act of February 27, 1843, to provide for the sale of lands for taxes, (session acts of 1842, '43, p. 142,) are the lands and lots embraced within the first clause of the 1st section of said act, viz., lands and lots sold or forfeited to the state for taxes, and upon which the taxes have been due and unpaid for six years. Therefore, where the petitioner applied to the register to enter certain lands returned delinquent for the years 1837, '38, and it appeared that the lands were not returned until the 13th of December, 1837, they were not subject to entry under said 29th section, the six years not having elapsed at the time the lands were offered for sale.—See 4th section of the act of February 6, 1837, concerning "Revenue Session Acts of 1836, '37," p. 132.

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PETITION FOR A MANDAMUS.

In the Supreme Court.

TOMPKINS, J., delivered the opinion of the Court.

The petitioner states that he applied to the register to enter 640 acres of land, assessed in the name of John Rourke, for the State and county taxes due thereon for the years 1837 and 1838, and returned delinquent for these years, and which had been offered for sale on the first Monday in September, 1843, by the sheriff of St. Charles county, and was returned not sold, for want of bidders.

This application is made under the 29th section of an act approved 27th February, 1843, entitled, "An act to provide for the sale of lands for taxes." The section is in these words, to wit:—

Sec. 29: "Whenever any lot or tract of land that has been sold to the State for taxes, or has been forfeited for taxes, shall have been offered for sale under this act, and shall have been returned by the sheriff unsold, such tract shall be liable to entry at the register's office, by any person who will pay therefor all the taxes, interest, penalties and costs of every kind due thereon, and upon such payment the register shall execute, to the person making such payment, a deed for such lot or land, similar to the deed required by this act to be executed to purchasers at public sale."—Session act, p. 142.

In order to learn what lot or tract of land sold to the State for taxes, or forfeited for taxes under this 29th section, we must refer to the 1st section of the same act, which is as follows, to wit:—

Sec. 1: "All lands and town lots which have been sold to the State for taxes, and lands and town lots which have been forfeited to the State for taxes, and upon which lands or lots taxes have been due and unpaid for six years, shall, by the sheriffs of the counties in which such lands or town lots lie, be sold for cash in hand, at such time and place as is hereinafter provided; and so much of each and every tract of land, and so much of each and every town lot as will pay the taxes, interest, and costs, due upon the same, which have been returned to the proper office as non-resident delinquent lands and lots, and upon which the taxes for the year 1841 (or any prior year not embraced in the first clause of this section) shall be sold by the sheriffs of the counties in which such lands and lots lie, at such time as is provided in this act."

In the first clause of this section we find, that lands and town lots sold to the State for taxes, and also lands and town lots forfeited to the State for taxes, and on which lands and lots taxes have been due and unpaid for six years, whether those lands and town lots have been sold or forfeited, are to be sold for cash in hand at such time and place as hereinafter to be provided.

In the second clause of the same section we find, that so much of each and every tract of land, and so much of each and every lot as will pay the taxes, interest, and costs due upon the same, and which have been returned to the proper office as non-resident delinquent lands and lots, and upon which the taxes for the year 1841 (or any year not embraced in the first clause of this section) shall, at the

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time of said sale, be due and owing, shall be sold by the sheriffs of the counties in which such lands and lots lie, &c.

The lands and lots which are liable to entry under the 29th section of the said act, "To provide for the sale of lands for taxes," are evidently the lands and lots mentioned in the first clause of the first section of this act, on which lands and lots taxes had been due and unpaid at the time of the sale (first Monday in September, 1843,) for six years. Some of these lands had been sold to the State, by the auditor, previously to the year 1835, and the remaining part of them had been forfeited under the 4th section of the act of 6th February, 1837, amendatory of an act to provide for levying and collecting the revenue. The register's return shows that the land sought to be entered by the petitioner was not returned by the collector of the proper county till the thirteenth day of December, 1837, and consequently it would not become forfeited to the State, under the provisions of the 4th section of the last-mentioned act, till the lapse of six years; for the land does not become forfeited to the State when it is struck off to the State, because the same 4th section gives the right of redeeming at any time within two years. (Act of 1837, p. 132.) This land, then, here sought to be entered, was not of that description of lands directed to be sold *for cash in hand*, by the first clause of the 1st section of the act of 1843. (Pamphlet act, p. 138.) But it is of that description of lands set out in the second clause of the said first section, returned as non-resident delinquent lands, of which so much was directed to be sold as would pay the taxes, interest and costs due thereon. At the time the petitioner sought to enter this land, the six years had elapsed. But the 25th section of the act directs a different disposition to be made of it. By this section the register of lands is directed to make out a list of all lands and town lots which have been returned by the several collectors of the State to the proper office, for the non-payment of taxes for the year 1841, or any year prior, including all such as have been sold to the State for taxes, and all such as have been forfeited to the State for taxes, and all such as have been returned for the non-payment of the taxes for the year 1841, or any year prior, but not yet forfeited. By the 26th section, the register is required, on or before the 10th day of August, 1843, and by the 28th section, he is further required, annually, after the year 1843, on or before the 10th day of August in each year, to certify to the several sheriffs all the lands and town lots which shall be subject to sale for taxes that year; and also all such lands and town lots as shall have been returned unsold by the sheriffs, under the provisions of this act, and shall not have been redeemed.

Those lots mentioned in the 26th and 28th sections are made, by the 27th section, the sheriff's authority to sell; and throughout this law, the distinction is kept up betwixt land sold or forfeited to the State, and land struck off to the State, or, as it is expressed in this act of 1843, in the 4th section, land returned as unsold which it is declared shall continue the absolute property of the State. This absolute property of the State cannot be divested until, the taxes having remained six years unpaid, it has been offered for sale *for cash in hand*, and then, only, it becomes liable to entry under the 29th section of the act of 1843, above referred to.

The motion for a peremptory mandamus is overruled.

Smoot vs. Wathen, Administrator, &c.

SMOOT vs. WATHEN, ADMINISTRATOR, &c.

1. The statute of frauds rendering void loans of personal property, after five years' possession, as to all creditors and purchasers of the persons remaining in possession, &c., does not affect the title as between the parties to the loan, as between them the property is still considered a loan. And where the loanee dies in possession the property is not considered as assets, nor can it be recovered as such by the executor or administrator of the loanee. — See act of January 4, 1825, concerning "Fraud," sec. 3 Rev. Stat. of 1825, p. 402; also, act of February 11, 1835, concerning "Fraud," sec. 5 Rev. Stat. of 1835, p. 283.
2. It is well settled that the five years possession, which gives title under the statute of limitations, and enables a defendant to maintain his possession, or a plaintiff to sustain his action, must be an adverse possession. — See act of March 16, 1835, concerning "Limitation," art. 2 Rev. Stat. of 1835, p. 393, 4.
3. Joint tenants, or tenants in common of a chattel, must join in an action for the recovery of the chattel, or its value.
4. Where an action of detinue is brought by a tenant in common of a chattel, without joining his co-tenants, the non-joinder may be plead in abatement, or may be taken advantage of on the trial although the form of the action is *ex delicto*. — Scott, J., dissenting on this point.

ERROR to Cape Girardeau Circuit Court.

LEONARD, for Plaintiff in Error.

First, The plaintiff below is not a creditor or purchaser within the meaning of the fifth section of the act for the prevention of fraud, passed January 4, 1825, (Rev. Stat. of 1825, p. 402,) or of the fourth section of the same act, revised and passed February 11, 1835, (Rev. Stat. of 1835, p. 283,) and entitled, by virtue of this act, to insist that his intestate acquired title to this slave by five years' continued possession, there being no registered deed or will manifesting the loan. — 5 Munf. Rep., 305; Tucker's Commentaries, 345, 346.

Second, The statute of limitations did not commence running upon the possession of Mr. Smoot, the husband, until that possession became adverse to the party having the title. — *Gillispie vs. Gillispie's Heirs*, 2 Bibb, 92; *Montague vs. Lord Sandwich, Esp.*, N. P. Rep., 595.

Third, The verdict was clearly against the evidence. The original possession of the husband was under a loan, and not a gift to the wife, and never became hostile until 1836, when he refused to surrender the possession so acquired, and thereby converted his holding into an adverse possession. — *Jackson vs. Parker*, 3 Johns. Cases, 124; *Brandt vs. Ogden*, 1 Johns. Rep., 158; *Jackson vs. Thomas*, 16 Johns. Rep., 300; *Jackson vs. Waters*, 12 Johns. Rep., 367.

SCOTT and ZEIGLER, for Appellee.

One point only seems to arise in this case: — Did not the slave Mary become the absolute property of Smoot, he having, in

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right of his wife, an acknowledged claim to the slave, and having had the undisturbed possession for nearly six years? This was either a gift or a loan, by Susan Block, of the slave to Rachel Block, alias Smoot, her daughter, wife of William Smoot.

If a gift, the consideration being good—that of marriage,—and as possession *bona fide* accompanied the gift, then the property was Smoot's, the husband, in right of his wife.—Laws of 1825, p. 402, sec. 3; Laws of 1835, p. 283, sec. 4.

If a loan, as is pretended, then the possession of Smoot was ripened into a title, as he remained in peaceable possession nearly six years without any demand made or pursued by due course of law by the pretended lender.—Laws of 1825, p. 402, sec. 3; Laws of 1835, p. 183, sec. 5.

Smoot does not appear to have had anything to do, or to have been consulted or apprised of the pretended arrangements between Susan Block and Rachel, his wife.

It is not necessary that in such cases the possession should be *adverse*, as is pretended by the plaintiff in error. The statute does not contemplate that the possession should be adverse, to give the title.

NAPTON, J., delivered the opinion of the Court.

Wathen, administrator of William Smoot, deceased, brought an action of detinue against Rachel Smoot, widow of the deceased, to recover a slave named Mary Ann. The defendant pleaded *non detinet*. Issue was taken thereon, and the cause was submitted to the court, neither party requiring a jury. The court found, that the defendant did detain the slave, and that her value was five hundred and fifty dollars. It was therefore adjudged, that the plaintiff have and recover said slave, or in default thereof, that he recover the damages, &c. A motion for a new trial was made and overruled, and exceptions taken to the opinion of the court.

The facts preserved by the bill of exceptions were the following:—In 1831, the County Court of Cape Girardeau county ordered a division of the slaves of Simon Block, deceased, among his heirs. Commissioners were appointed to make the division, and it appearing, from the report of the commissioners, that division in kind could not be made, an order of sale was made, and a sale took place in pursuance of such order. At the sale, Susan Block, administratrix and guardian of her three minor children, Rachel, Zipporah, and Rebekah, purchased three slaves, Mary Ann, Charlotte, and Jane, for the use and benefit of these minors.

In December, 1832, Rachel Block intermarried with William Smoot, and some few months thereafter went to house-keeping. Mrs. Smoot applied to her mother for the slave Mary Ann, which request Mrs. Block at first declined acceding to, alleging that said slaves, Mary Ann, Charlotte, and Jane, were of unequal value, and designed for all her wards. At the instance of John Juden, who had intermarried in the family, Mrs. Block consented that Mrs. Smoot should have the slave, with the understanding that said slave was to be returned to Mrs. Block whenever demanded. It does not appear that Smoot was privy to this

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understanding, or knew anything of the arrangement between his wife and Mrs. Block.

In 1836, in consequence of the marriage of Zipporah, another daughter of Mrs. Block, she applied to the County Court for an order for a division of said slaves, which was granted, and commissioners appointed. Application was made to Smoot for the girl Mary Ann, but he refused to deliver her up. Measures were taken to institute a suit, but nothing was done; and in December, 1838, Smoot died, having retained possession of the slave from the time of his marriage, or shortly thereafter, until his death.

Subsequently to the death of Smoot, in 1839, a division of the slaves was made, and Mrs. Smoot was permitted to retain possession of the girl Mary Ann, by paying to her sisters, Zipporah and Rebekah, seventy or eighty dollars, which the commissioners who made the divisions supposed to be the amount by which said slave Mary Ann exceeded the others in value.

The bill of exceptions, after reciting the testimony, concludes as follows:—"The plaintiff read to the court the statute law of Missouri, and contended that the possession of said slave in controversy by said Smoot, from the time of his intermarriage with defendant to the time of his death in December, 1838, vested a title thereto in said Smoot by possession.

The defendant contended, that such possession by William Smoot, from the time of such intermarriage to the time of his death, did not vest any right to said slave in said William Smoot, unless the said William Smoot held the slave adversely to said Susan Block, or the rest of said wards; and that the five years' possession by said William Smoot, to vest a title to said slave under the law, could only commence from the time of his refusal to have a division in 1836. The court decided the law in favor of the plaintiff; that the said five years' possession by William Smoot, required by law to vest a title to said slave, commenced from the time he came into possession thereof on his intermarriage, and not from the time of his refusal to have the slave sent to the commissioners for a division in 1836. To which decision of the Court the plaintiff excepts, &c."

The bill of exceptions does not show, in a very satisfactory manner, upon what ground the decision of the Circuit Court was based, or what specific point that court intended to decide. I will, however, consider the question in the different aspects in which it has been presented in the briefs.

1. The statute of frauds, it is believed, has no application to this case. Supposing this to have been a loan, and therefore made void by that statute as to creditors and purchasers, the property, as between the parties, is still considered a loan, and when the loanee dies possessed, the property is not assets, nor can it be recovered as such by the administrator. It is *liable* to the creditors in another form of proceeding.—5 Mun., 305; 1 Tuck. Com., 346.

2. It is well settled, that the five years' possession, which gives title under the statute of limitations, and enables a defendant to maintain his possession, or a plaintiff to sustain his action, must be an *adverse* possession. (Clark vs. Hardiman, 2 Leigh., 351; Brent vs. Chapman, 5 Cranch., 358.) The Circuit Court, it is stated in the bill of exceptions, held that the possession requisite to give title in

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Smoot commenced from the time of his first getting possession of the slave after his marriage, and not from the time when he refused to deliver her to the commissioners. The Court may have thought that the possession was adverse from the time of intermarriage, on the ground that Smoot was not privy to the arrangement by which his wife got possession of the slave; but we think the more reasonable interpretation of the language of the judge, in deciding the law for the plaintiff, is, that in his opinion it was not necessary that the possession requisite to give title should be adverse. An adverse possession, under the circumstances of this case, will not be presumed; it must appear by proof. (*Gousevoort vs. Parker*, 3 Johns. Cases, 124.) In the case of *Jackson et dem. Bratt vs. Tibbett*, (9 Cowen, 241,) it was held, that where one tenant in common entered in or was possessed of lands generally, he should be presumed to have entered or taken and possessed, consistently with the common title of all, and though his title was exclusive, the statute of limitations did not run against his co-tenants. But when the party in possession claims an exclusive right by some notorious act, the statute begins to run from the time of such claim. Tenants in common of a chattel have an equal right to the possession, and the possession of one is considered the possession of all, and therefore it is held, that one tenant in common cannot bring an action against his co-tenant to recover possession of the chattel held in common.—Per Lord Mansfield, in *Fox vs. Hawbray*, 2 Cowper, 445.

3. Apart from the title by possession under the statute of limitations, which, as we have seen, must be an adverse one, we are not referred to any other principle upon which the judgment of the Circuit Court can stand. It is suggested, that the plaintiff's intestate, acquired by marriage, whatever interest his wife had in the slave; and that being, in this way, tenant in common with the minor sisters of his wife, this interest passed to his administrator, and may be recovered in this form of action. It is true, that Smoot acquired, by virtue of his marriage, all the title to the slave in question which his wife had, and it would be fair to conclude, from the testimony, that Mrs. Smoot, in common with her two unmarried sisters, were owners of the three slaves purchased by Mrs. Block for their use and benefit, and with their money. Smoot, upon his marriage, then, was tenant in common with the two sisters of his wife, and this interest, upon his death, vested in his personal representatives. Where there are joint tenants or tenants in common of a chattel, the joint tenants or tenants in common must join in any action, whether founded *de delictu* or *ex contractu*; but a non-joinder, in cases where the action is founded in tort, can only be taken advantage of by plea in abatement, whilst in actions *ex contractu* it may be taken advantage of at the trial, under the general issue. (1 Chitty Plead., 14.) The action of detinue seems formerly to have been considered an action founded on contract, but later authorities incline to regard it an action *de delictu*.

The gist of the action is now considered the *wrongful detainer*, and the action may be sustained though the defendant obtained possession tortiously. (1 Bos. & Pull., 140.) Still, the action of detinue, whether it be founded on a bailment or a tortious conversion, is for the recovery of a specific chattel, and, in this respect, closely resembles the action of debt or replevin. The judgment is for the specific

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chattel, as in replevin, and the action (whatever it may be in form) has in its results but little analogy to actions for injuries to chattels.

In the case of *Hart vs. Fitzgerald*, (2 Mass. Rep., 510,) C. J. Parsons takes a distinction between actions for damages and the action of replevin, notwithstanding this latter action is uniformly placed by writers on pleading under the head of actions *de delicto*. "In trespass or case," the judge observes, "for an injury done to a chattel, each part owner, in fact, is injured, and the damages, if not severed by the form of action, must be divided among the plaintiffs after recovery. In these actions, also, are cases in which one part owner may legally sue alone, without joining his partners. In replevin, which is founded on property, the chattel is to be delivered to the plaintiff as well as damages to be recovered. This chattel is not capable in law of severance; and the whole or none of it can be delivered to the plaintiff; and if it be delivered to the plaintiff, being but a part owner, he must receive an undivided part in which he claims no property. In replevin, we do not recollect any case in which a part owner can sue for his undivided part only." It was accordingly held, that though no plea in abatement or in bar was pleaded, yet, it appearing from the plaintiff's own showing that he claimed an undivided moiety of the chattel sued for, judgment was given against the plaintiff. This principle was subsequently recognized by the same court in *Gardner vs. Dutch*, 9 Mass. Rep., 407.

What the Massachusetts courts have said in relation to the action of replevin, will apply with equal force to the action of detinue. The former has been uniformly considered an action *in tort*, whilst the latter has been at times classed indifferently under the heads of contract and wrong, and may therefore, with more propriety, be brought within the general principle governing actions on contract.

Upon the hypothesis, then, that the plaintiff's intestate was a tenant in common with the two sisters of his wife, and that the possession of the slave Mary Ann was not adverse to his co-tenants, he cannot maintain an action of detinue for his undivided interest, without joining the other co-tenants in the action. The non-joinder need not, in such an action, be pleaded by way of abatement, but may be taken advantage of at the trial.

The judgment will be reversed, and the cause remanded.

Scott, J.—Separate opinion.

Neither the statute to prevent frauds, nor the statute of limitations, gave the administrator of Smoot a right of action. The statute to prevent frauds did not, because there was no loan, nor could there have been one, because Mrs. Block, the guardian, had no authority to make such a loan of the slave as would have affected the title of her wards. But had she been the owner of the slave and made a loan, yet as between her and Smoot the title would not have passed by any possession, however long continued. The transaction, as between them, would still have been a loan, and would be so regarded by all courts. The administrator of Smoot, succeeding only to his right, is as much precluded from insisting that the transaction is not a loan as Smoot himself would have been, had

he been alive and had brought this suit. Creditors and purchasers might contend, that as to them, the title to the slave had rested in Smoot, and was subject to their demands against him, and by bringing an action against Rachel Smoot, as executrix *de son tort*, might have recovered the slave.

The statute of limitations did not give a title to Smoot, because his possession was not adverse; he became possessed of the slave with the consent of Mrs. Block, and it was only some two years before his death that he denied her right and claimed to hold adversely. Five years' adverse possession is required by the statute of limitations to give a title to personal property.

It is clear from the evidence, that Rachel Smoot was a co-tenant of the slave in controversy with her two sisters. Each had an undivided third in each of the slaves. The possession of one joint tenant, or tenant in common, is the possession of all. Rachel Smoot being entitled, as co-tenant, to one-third of the slave, when that slave came to the possession of her husband, he became co-tenant with the other daughters. His wife's property in the slave was reduced into his possession, and being reduced into possession during his life, when he died his right to the slave survived to his administrator, and not to his wife. So Smoot died tenant in common of the slave with his two sisters-in-law, and consequently, the right of his administrator to an undivided third of the slave is unquestionable. The form of this action is detinue, and whatever doubt may formerly have been entertained on this subject, the modern doctrine seems to be well settled, that the action of detinue is an action in form *ex delicto*; it is founded on the wrongful detention of property, and not on contract. The administrator suing as tenant in common and not joining his co-tenants, his action, being in form *ex delicto*, could have been defeated by a plea in abatement, and by such a plea alone. That plea was, however, not entered, consequently, he was entitled to recover. But it is well settled, that in form *ex delicto*, instituted to recover the value of property wrongfully detained, a plaintiff's damages may be reduced by showing that he is tenant in common with others who are not joined. Then the value of the slave, instead of being fixed at five hundred dollars, her entire worth, should have been only one-third of that sum. The case of *Hart vs. Fitzgerald*, (2 Mass. Rep.,) in which it was held that an action of replevin cannot be brought by one co-tenant against a stranger, and that the non-joinder of the co-tenants might be given in evidence on the trial to defeat a recovery is contrary to the well-settled doctrine of the common law.—Chitty, 75, 138; 1 Cowper, Fox vs. Hanbray, 445; 4 Phil. Ev., 229."

Judgment reversed.

*Roussin vs. Parks.***BOUSSIN vs. PARKS.**

A confirmation under the act of Congress of April 29, 1816, of a claim recommended for confirmation by the recorder of land titles, enures to the benefit of the confirmer, and a certified copy of the opinion of the recorder of land titles, recommending the claim to Congress for confirmation to the extent of a league square, is evidence that the claim is embraced within the act of April 29, 1816, as all the claims recommended by the recorder for confirmation were confirmed by that act.

ERROR to Washington Circuit Court.

COLE, for Plaintiff in error.

1. The marriage contract between Francis Tayon and Pelagia Chauvin was improperly received, because it does not appear that the instrument belonged to the archives of the French or Spanish government, therefore it was not evidence of itself; and there was no other proof offered. — Acts 1838, p. 42-5.

There is no proof of the time when the marriage contemplated by the contract took effect, so as to show the concession granted during the marriage, without which proof the contract is a nullity, so far as the land in controversy is concerned; nor will the legal title to the land pass to the plaintiff by virtue of said contract alone, so as to enable her to sustain the above action.

The land being a concession from the king was not that species of property that entered into common right, but remained the exclusive right of the husband; and there being children surviving the husband, the widow was excluded from all right to such property. — 11 White's Compilation, 82.

2. The copy of confirmation of the recorder of land titles, and survey for a league to Pierre Chouteau, part of the 10,000 arpents in controversy was legal evidence in the cause, and illegally excluded by the court. — See L., p. 251, sec. 6, 7; 12 Peters' Rep., 412; 6 *Ibid.*, 770, 771; 4 Mo. Rep., 459; 6 *Ibid.*, 106.

3. The deed from Francis Tayon to Pierre Chouteau, dated 3d January, 1804, for the 10,000 arpents in controversy, was legal evidence on part of the defendant, and illegally excluded by the court. — 1 Phil. Ev., 348-51.

4. The confirmation of the residue of the 10,000 arpents by the late board was improperly admitted to go in evidence to the jury, because it is no evidence of a confirmation under the act of Congress of July 4th, 1836. That act only operates upon certain claims, in certain transcripts of certain reports, and there is nothing in these proceedings to show that this is one of them. — See the act.

5. As to the first instruction asked by plaintiff, and given by the court —

The cases referred to in Peters' Reports were decided upon the peculiar words of the Florida treaty, and do not apply. The survey relied upon in support of plaintiff's title, as sufficient evidence of title under our statutes, is good only against one not having a better title; and it is submitted, that the confirmation in this case to Pierre Chouteau, with the accompanying title deeds, show that title to be in the defendant.

6. The third instruction asked by plaintiff, and given by the court, is erroneous — Because this claim is not shown to be one of those confirmed by act of Congress, 4th July, 1836; and as to the residue of the *instruction* about “*representatives*,” it is wrong, for such term includes devisees, heirs, purchasers — which the *instruction* given denies to be a legal representative.

7. The fourth instruction, asked and given on part of plaintiff, should not have been given, because it has no application, and because the confirmation to Chouteau does not exceed a league, as made by recorder, and because the act of recorder was subsequently confirmed by Congress. — Act Congress, 29th April, 1816.

8. The instructions numbered 1, 4, 5, 6, 9, 11, 12 and 13, asked to be given by defendant, and refused by the court, were legal; and the mere reading of the instructions will show, that the refusal of the court to give them violated the plainest principles of law. As to one of them, see 12 Peters, 454; and as to the others, all the evidence in the cause.

9. Besides what is above stated, it is insisted that the verdict is against law and evidence in this — the title to the confirmation of a league was clearly in Pierre Chouteau; and whatever doubt might exist as to title to the residue of the 10,000 arpents, it was not shown that the defendant was in possession of any part of that residue. — See plaintiff’s evidence, L. M., 234; *Strother vs. Lucas*, 12 Peters, 454.

Note. — By the Spanish law, the husband, being the head of the community, could dispose of the property acquired during marriage, without the consent or concurrence of the wife, whether the property were real or personal, and the title made in terms to wife or husband. — 3 Febrero, 164, No. 26; 3 Recopilacion, 426, law 5, from J. Spaulding.

FRISSELL, BIRD, and BRENT, for Defendant in Error.

1. The certificate of confirmation by the recorder of land titles was properly excluded from the consideration of the jury. First: It purports to be a copy of a record, and upon its face shows that it is not a copy of the whole record, but is a mere index to the record. Second: Because, upon its face, it shows that the recorder of land titles had not power to act upon the claim. — *Laws of the United States*, Geyer’s Digest, 464, sec 3; *Ibid.*, 476, sec. 1.

2. The copy of the plat of survey was properly excluded, it appearing upon its face to have been made for Pierre Chouteau under Charles Tayon, and no evidence offered in connection with it to show that it was even intended for the survey of the land confirmed to Pierre Chouteau under Francis Tayon. — *Laws of Mo.*, 251, sec. 6.

3. The paper purporting to be an original conveyance from Francis Tayon to Pierre Chouteau, was properly excluded from the consideration of the jury. First: Because the paper purports to have passed from the custody of M. P. Leduc, a private individual, to the recorder of St. Louis county, on the 24th of May, 1837, and never to have belonged to the archives of the French or Spanish government, or to have been deposited in the office of the recorder of land titles by virtue of any law of the United States. (*Acts of 1838-9*, p. 42, sec. 3-5.) Second: Because, although the hand-writing of Delassus was duly proved, yet there was no

evidence offered to show that the said Delassus was either dead or out of the jurisdiction of this Court. Third: Because they did not prove the hand-writing of Francis Tayon, the grantee, or offer any evidence for that purpose.—Statute of Mo., p. 121, sec. 16, 17, 18: 1 Starkie, 333, and note.) And, fourth: Because it could not be read in evidence as an ancient deed, because there was no evidence offered of any possession in accordance with it.

4. The marriage contract between Pelagia Chauven Charleville and Francis Tayon was properly admitted in evidence under section five of the acts of 1838, 9, Geyer's Digest, 332, sec. 7; Geyer's Dig., 189, sec. 5.

5. The copies of the papers, documents, and proceedings before the different boards of commissioners, in relation to the claim of Francis Tayon, and the certificate of confirmation by the late board, were properly admitted in evidence, but their effect as evidence was a proper subject of instruction for the court.—Laws of Mo., 251, sec. 7; Acts of 1838, 9, sec. 4.

6. The first instruction prayed for by the defendant, to wit—"That the plaintiff cannot recover in this cause, unless the jury shall find, from the evidence, that she was legally entitled to the possession of the premises in controversy, at the commencement of this suit," was properly refused by the court, because that instruction refers a matter of law to the decision of the jury. She being entitled to the possession of the premises in controversy is an inference of law from all the material facts of the case, and, as such, could only be legally drawn by the court, and not by the jury.

7. The third instruction prayed for by the defendant, to wit—"Nor can the plaintiff recover, if the jury shall find, from the evidence, that she has an undivided interest in said land with others," was properly refused, because the plaintiff having an undivided interest, is no legal bar to an action of ejectment.

8. The fourth instruction prayed for by the defendant, to wit—"Nor can the plaintiff recover in this action, unless the jury shall find, from the evidence, a lawful marriage contract existing between Francis Tayon and the plaintiff, and that the marriage of said Tayon and plaintiff did take place in pursuance of that contract between them, and that said contract did invest the plaintiff with the right she claims in this action, and that Tayon is dead," was properly refused by the court, because whether the said marriage contract did invest plaintiff with the right to one-half of the land or not was a question of law, and not a proper question for the determination of a jury.

9. The fifth instruction prayed for by defendant was properly refused, to wit—"If the jury shall find, from the evidence, that there is an outstanding title to the premises in dispute, in any person better than plaintiff's, then the plaintiff cannot recover in this action," because this instruction refers a matter of law to the determination of the jury.

10. The sixth instruction prayed for by the defendant, to wit—"If the jury shall find, from the evidence, that there was a marriage contract between the plaintiff and Francis Tayon, yet the proof '*per se*' will not justify them in rendering a verdict for the plaintiff in this action," was properly refused by the court: first, because the law requires that the court should instruct the jury in the English

language, if they instruct them at all; and, second, because after the translation of the instruction into the English language, it would require the jury to find their verdict upon a state of facts which had no existence.

11. The eighth instruction prayed for by the defendant, to wit—"There is no evidence before the jury to identify the plaintiff in this cause, or that she was ever married to the said Francis Tayon, under whom she claims," was properly refused by the court, because there was evidence on both points. (See deposition of Ceri.)

12. The ninth instruction prayed for by the defendant, to wit—"That there is no evidence before the jury that the defendant is within the lines of the confirmation of 2,944 arpents confirmed by the report of the late board of commissioners, by the act of Congress of the 4th of July, 1836," was properly refused by the court, because the plaintiff did not claim 2,944 arpents, but 10,000, as confirmed by the act of Congress of July 4th, 1836, according to the report of the late board of commissioners, and there was evidence of the defendant's being within the lines of the survey of the 10,000 arpents.—See Le Mora's testimony, and the deed from Chouteau to Roussin.

13. The tenth instruction prayed for by the defendant, to wit—"That there is no evidence that the 2,944 arpents confirmed by the act of Congress of July 4th, 1836, on the report of the late board of commissioners, were surveyed since the confirmation," was properly refused, because it is immaterial whether the survey has been made since the confirmation, provided it appears to have been made by proper authority under the French or Spanish government, and recorded according to the usages of the country prior to the 10th day of March, 1804; and because there was no confirmation of 2,944 arpents offered in evidence in the cause; the confirmation offered in evidence being for a tract of land according to the concession on a concession for 10,000 arpents.—Laws of Mo., 234, sec. 2; see "Confirmation and Concession."

14. The eleventh instruction prayed for by the defendant, to wit—"If the jury shall find, from the evidence, that the plaintiff in this action, and Pierre Chouteau, are tenants in common in the land in controversy, then, unless the jury shall further find that the plaintiff has been ousted from the possession before the commencement of this suit, they must find for the defendant," was properly refused; first, because there was no evidence that Chouteau and plaintiff ever had been or claimed to be tenants in common, but as far as there was any evidence of Chouteau's claim, he claimed to the exclusion of all others; and, second, because what constitutes an ouster is properly a question of law.

15. The twelfth instruction prayed for by the defendant, to wit—"If the jury shall find, from the evidence introduced on the trial by the plaintiff, that seven thousand and fifty-six arpents, or a league square of the ten thousand arpents, had been confirmed to Pierre Chouteau by the government of the United States, by their board of commissioners, then the said plaintiff is estopped to deny the title in Pierre Chouteau in said league square, and must find for the defendant, unless they shall further find that the trespass complained of has been committed on other lands, to which the plaintiff is lawfully entitled to the possession, and of

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which the defendant held the unlawful possession at the commencement of the action," was properly refused, because there was no evidence given by the plaintiff, proving or conducing to prove at the trial, that 7,056 arpents, or a league square of the 10,000 arpents had been confirmed to Pierre Chouteau by the government of the United States, by their board of commissioners, and because no less no less than two distinct legal propositions are submitted to the decision of the jury by said instruction, to wit — the plaintiff being legally entitled to the possession and the defendant being illegally in the possession of certain supposed premises.

16. The thirteenth instruction prayed for by the defendant, to wit—"If the jury shall find, from the evidence in the cause, that Pierre Chouteau is the legal representative of Francis Tayon to the land in controversy, then the plaintiff cannot recover in this action," was properly refused, because there was no evidence in the cause that Pierre Chouteau is the legal representative of Francis Tayon, and whether he is a legal representative or not is a question of law.

17. The fourteenth instruction prayed for by the defendant, to wit—"That the late board of commissioners of the United States for the adjustment of land titles in the State of Missouri had no lawful authority to annul previous confirmations made by other commissioners, or the recorder of land titles: but if such has been done in the case of Francis Tayon and Pierre Chouteau, then the last confirmation, so far as it conflicts with the first confirmation made by F. Bates, recorder, is void," was properly refused, because there was no evidence offered to show that any previous confirmation had been annulled by the late board of commissioners, and because, if it had been shown that F. Bates, recorder of land titles, had confirmed a part of a claim for more than a league square to the extent of a league square under the act confirming this jurisdiction to claims not exceeding a league square in extent, the confirmation of the recorder in such case would not be voidable but absolutely void.

SUPPLEMENTAL.

The marriage contract was an authentic act, and as such proves itself.—See White's new Recopilacion, vol. 1, p. 41, particularly note 3; and page 296, same book, and acts 1838, 9, p. 42, 3, sec. 5 and 12.

Under the fifth section of the act of 1838-39, a marriage contract is evidence of title, and this marriage contract bears internal evidence, or rather evidence upon its face, and by its endorsements, of being an authentic act.

Marriage contracts are almost universal, in countries governed by the civil law, and in many instances they affect property, both real and personal, to large amounts.

It is contended, that upon the facts presented by this record, the question of the power of the husband to sell the property of the community does not arise, the defendant below having offered no competent evidence that such a sale had been made, and, again, the law referred to in Mr. Cole's brief does not, by any means, sustain his position.

Opinion of TOMPKINS, Judge.

Pelagia Parks, the defendant in error, brought her action of ejectment in the Circuit Court of Washington county, to recover the possession of ten thousand

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arpens of land against Etienne Roussin, and judgment being rendered there in her favor, Roussin, to reverse it, prosecutes this writ of error.

On the trial of this cause the plaintiff, defendant in error here, gave in evidence the petition of Francis Tayon, dated the 15th of October, 1799, to Delassus, then lieutenant-governor of Upper Louisiana, for the ten thousand arpens of land here sued for, and a concession, &c.

The plaintiff also gave in evidence a copy from the recorders of the first and last boards of commissioners, of their actions upon this claim of Francis Tayon. By this copy it appears that this claim was twice rejected. It was presented each time by Peter Chouteau, as assignee of Francis Tayon; first, on the 3d May, 1806, to the board consisting of commissioners Lucas, Penrose, and Donaldson; and, second, on the 18th of August, 1810, when it was rejected by Penrose and Bates, commissioners, Lucas being absent afterwards, to wit, on the 18th day of February, 1833, it appears to have been again presented. The entry is as follows: "Francis Tayon, by his legal representative, Pierre Chouteau, sen., claiming the balance of ten thousand arpents of land, a league square, of which has been confirmed, (see book C., pp. 379, 380, minutes No. 4, p. 464; No. 3, p. 64, wherein a league square has been confirmed,) produces a paper purporting to be a commission from Charles D. Delassus, dated October 15th, 1799, &c. It is further stated, that on the 7th November, 1833, the board met, present, A. G. Harrison, F. R. Conway, L. F. Linn, commissioners.—Francis Tayon claiming 10,000 arpents of land, &c. The board are unanimously of the opinion, that this claim ought to be confirmed to Francis Tayon, or his legal representatives, &c.

The plaintiff, Parks, also gave in evidence a marriage contract, purporting to have been entered into betwixt Taylor and herself, certified to have been recorded in St. Louis county, the 8th February, 1818, by the recorder of that county. This contract bears date the 8th day of June, 1795, and appears to have been signed by them in the presence of witnesses, Antonio Soulard, the lieutenant-governor, and others, parents, relatives, and friends, except Pelagia Chauvin, (the defendant in error,) Francis Brazeau, and Joseph Tayon, who, not knowing how to sign their names, have made the sign of the cross, according to the custom of the village in such cases. Francis Tayon, the person in whose right this woman claims this land, signs his name to this marriage contract under which she claims, and the date of this marriage contract is five years anterior to the petition to the lieutenant-governor for the land in question; to which petition he affixed his cross, as is said to have been the custom of the village. No proof of the execution of the said marriage contract was offered. The plaintiff then read in evidence the deposition of Pascal Ceri, taken on 2d March, 1840. This witness stated that he knew Francis Tayon, son of Joseph Tayon: Francis Tayon married Pelagia Chauvin Charleville, now the widow of Arthur Parks, deceased: Francis Tayon left one son, Francis N. Tayon: he knew Francis Tayon, son of Charles Tayon and nephew of Francis Tayon, senior, deceased; he is now about forty or forty-five years of age, according to the witness' recollection: he knows, by report, that the first wife of Pierre Chouteau, senior, was the daughter or granddaughter of Joseph Tayon, senior. By the terms of the above marriage contract the widow,

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there being one child of the marriage, was entitled to one-half of the property of Francis Tayon, her deceased husband, whether that property be real or personal.

The plaintiff further introduced evidence of her being a widow, and that Roussin resided on the survey of the said two thousand arpens of land. She also gave in evidence a deed from Pierre Chouteau to the defendant Roussin and Felix Valle, for a certain portion of the said land set out by metes and bounds, amounting to 1,988 arpens.

All the evidence offered by the plaintiff was objected to, but the Circuit Court permitted it to go to the jury, and exceptions were taken to such decisions of that Court.

The plaintiff's evidence being closed, the defendant offered in evidence a paper purporting to be, "Opinion of the recorder of land titles for Missouri territory, as to the claims entered under the act of 13th of June, 1812, and proved before the 1st of January, 1814, as provided by the act of the 3d of March, 1813," &c.

The statement is in tabular form, as those statements are commonly made; and it appears, from the paper offered in evidence by the defendant, that this same tract of land, claimed by the plaintiff in the Circuit Court, had been confirmed to Peter Chouteau, under Francis Tayon, by the recorder of land titles, to the extent of one league square; or rather that one league square of this tract of land had been recommended by the recorder to Congress for confirmation; and it appears by the second section of the act of 29th April, 1817, (6 Laws United States, 138; and 1 Land Laws, 69,9700,) that all the claims he recommended were confirmed.

The acting recorder certified this to be truly extracted from book No. 3, p. 64, &c., of the five books left in the office, purporting to be in the handwriting of the late recorder Frederick Bates, and to be his decisions on land claims since the adjournment of the late board; and this statement is endorsed—"They were arranged and fairly transcribed for report to the commissioner of the general land office, but not yet recorded in the books, because they have no authority till sanctioned by government;" dated, "St. Louis, November 1, 1815," and signed, "Frederick Bates."

This paper was objected to by the plaintiff's counsel, and the Circuit Court sustained the objection. The defendant excepted to its opinion. The defendant then offered in evidence a plat and certificate of survey of said tract of land, which was also excluded, and exceptions taken. The defendant then offered in evidence a deed in the Spanish language. The clerk of the Circuit Court of St. Louis county who is ex-officio recorder of said county, certifies, that the foregoing deed is truly recorded in his office in *Lirre Terrein*, and it appears to have been filed for record on 24th May, 1837, by M. P. Leduc. From the translation of this deed, it appears, for the want of a scrivener, to have been executed before the lieutenant-governor in the presence of the witnesses of assistance, Don Juan Robayana and Don Joseph Hortiz, by Francis Tayon, junior, and Pierre Chouteau: Tayon conveys the tract of land of 10,000 arpents, as conceded by the lieutenant-governor, and Chouteau accepts, &c.

This deed is dated the 3d day of January, 1804, and to it Tayon appears to

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have subscribed his name. The defendant then read in evidence the depositions of Julius Demun and Jean P. Cabana, taken on the 15th day of June, 1839.

Demun states, that "he is acquainted with the Spanish language; that he has examined the deed in that language herewith presented, and identified in the margin with the letter A., purporting to be a conveyance from Frances Tayon, son or junior, to Pierre Chouteau; that he has translated the same, and that the document herewith exhibited and identified in the margin with the letter B., is a true translation of the Spanish document aforesaid; that he is acquainted with the handwriting and signature of Charles Dehault Delassus, the subscribing witness to said Spanish document, &c., and believes it to be his signature. The word "higo," in the deed herewith presented, marked A., literally signifies son, and is generally used to signify junior, and has the same meaning as the French word "fils," or the English word "junior."

John P. Cabana states, that he has examined a Spanish document referred to in the foregoing testimony of Julius Demun; that he is acquainted with the signatures of Carlos Dehault Delassus, Pierre Chouteau and Joseph Hortiz, subscribed to the same, from having frequently seen them write, and these signatures he believes to be the proper signatures of those persons respectively. He further saith, that the body of the said Spanish document is in the proper handwriting of Joseph Hortiz. The deponent further saith that he knew Francis Tayon, son of Charles Tayon, who was the son of Joseph Tayon, who was the oldest of that name in this country, called Joseph Tayon, senior. He also knew another Francis Tayon, called Francis Tayon, senior, who was brother of Charles Tayon, son of Joseph Tayon, senior. This Francis Tayon married the daughter of the widow Charleville, who was called Pelagia, and who is now the widow Pelagia Parks; that at the date of the Spanish deed aforesaid, he knew of no other Francis Tayon than Francis Tayon the son of Joseph Tayon.

Francis Tayon, the son of Charles (is) now living, and is about thirty-six years of age: deponent never knew him to be called Francis Tayon, junior. At the date of the deed aforesaid deponent resided in the town of St. Louis, where also resided Francis Tayon, the son of Joseph Tayon. Charles Tayon then resided at St. Charles with his family; where his son Francis resided deponent does not know. At the date of the deed referred to, deponent did not know of any Francis Tayon called Francis Tayon, junior, but he was called simply Francis Tayon, and this was Francis Tayon, higo, or son, of Joseph Tayon, senior.

The Circuit Court decided that this evidence was not sufficient to authorize the reading of the deed, and accordingly excluded it, and its decision was excepted to.

The jury having found a verdict for the plaintiff, the defendant moved for a new trial for several reasons, which, all being common-place reasons, will, like the exceptions, be noticed generally.

On the trial of the cause the plaintiff prayed, and the court gave the instructions following:

1. If the jury shall find, from the evidence, that the land claimed was surveyed by a duly authorized officer under the Spanish government, for Francis Tayon, deceased, prior to the 10th of March, 1804, it became private property, seperated

from the domain of the king, and did not pass to the United States so as to enable them to sell or give it to any other, but was protected to said Francis Tayon, or his legal representatives, by the treaty of 1803, between the United States and France, and, without that treaty, by the law of nations.

2. That a survey so made as aforesaid is sufficient to enable the person from whom the survey was made, or his legal representatives under our statute, unaided by any act of Congress, to maintain ejectment against any person not having a better title.

3. That the act of Congress of the 4th July, 1836, confirmed this claim to the original grantor, or his legal representatives, and that by construction of law no person can be regarded as such representative except by purchase, devise, descent, or marriage contract, so as to show title under the original claimant.

4. No act of Congress prior to 1816 empowered or authorized any board of commissioners or recorder to adjudicate or decide on land claims in the late territory of Missouri exceeding one league square, therefore neither said Francis Tayon nor his representatives can be barred by such act of Congress.

The defendant asked, and the court refused, the following instructions, viz.:

1st. That the plaintiff cannot recover in this action unless the jury shall find, from the evidence, that she was lawfully entitled to the possession of the premises in controversy at the commencement of this suit.

2d. That the plaintiff cannot recover, if the jury shall find that she has an undivided interest in the land with others.

3d. The plaintiff cannot recover in this action, unless the jury shall find that there was a lawful marriage contract existing betwixt Francis Tayon and the plaintiff, and that a marriage did take place betwixt said Tayon and the plaintiff, in pursuance of that contract, and that said contract did invest the plaintiff with the rights which she claims in this suit, and that Tayon, the husband, is dead.

4th. If the jury shall find that there is an outstanding title to the premises in dispute, in any other person, better than the plaintiff's, then the plaintiff cannot recover in this action.

5th. If the jury shall find, from the evidence, that there was a contract of marriage betwixt the plaintiff and Francis Tayon, yet that proof "*per se*" will not justify them in rendering a verdict for the plaintiff in this action.

6th. There is no evidence before, to identify the plaintiff in this cause, or that she was married to Francis Tayon, under whom she claims.

7th. There is no evidence before them that the defendant is within the lines of the confirmation of 2,944 arpents, confirmed on the report of the late board of commissioners, by the act of Congress of 4th July, 1836.

8th. If the jury shall find, from the evidence, that the plaintiff and Pierre Chouteau are tenants in common of the land in controversy, then, unless the jury shall find that the plaintiff has been ousted by the defendant from the possession of the said land, before the commencement of this action, they must find for the defendant.

9th. If the jury shall find, from the evidence introduced on the trial by the plaintiff, that 7,056 arpents, or a league square of the 10,000 arpents, had been

confirmed to Pierre Chouteau by the government of the United States, by their board of commissioners, then the said plaintiff is estopped to deny the title to Pierre Chouteau in said league square, and must find for the defendant, unless they shall further find that the trespass complained of has been committed on other land to which the plaintiff is lawfully entitled to the possession, and of which the defendant held the possession at the commencement of this action.

10th. If the jury shall find, from the evidence in the cause, that Pierre Chouteau is the legal representative of Tayan to the land in controversy, then the plaintiff cannot recover in this action.

11th. That the late board of commissioners of the United States, for the adjustment of land titles for the State of Missouri, had no lawful authority to annul previous confirmations, made by other commissioners or the recorder of land titles, and the action of the last board, on a claim confirmed by a former board, or by the recorder of land titles, is a mere nullity.

The defendant, plaintiff in error here, excepted to the opinion of the court overruling his motion for a new trial, and in giving the instructions prayed by plaintiff, defendant in error here, and in refusing the instructions asked by himself.

Mr. Bird, for the defendant in error, says—"There was no evidence before the jury except that produced by the defendant in error, Pelagia Parks; and therefore if the court below committed any error, it must have been either in receiving evidence which should have been rejected, or in rejecting that which should have been received; or in refusing or giving some instructions, or in overruling the plaintiff's motion for a new trial. The defendant in error insists that there is no error in any of these particulars."

"1. The marriage contract, made in due form before the lieutenant-governor, was what is called in all countries governed by the civil law, 'an authentic act,' that is, an instrument that proves itself, and, by the Spanish law, a certified copy without the original would have been conclusive evidence.

"It is not in the power of our legislature to pass a law to destroy that evidence which would have been conclusive under the old law once in force here, and which is, in many instances, the only evidence of ancient titles.—*Owen vs. Hull*, 9 Peters, 625, 626.

"By an act of the Missouri Territory, passed in December, 1815, it was made the duty of the recorders in the several counties, on application for that purpose, &c., to record any paper found among the archives, and deliver the original to the applicant.

"Without this law, no notarial act could leave the Spanish archives, and by it a copy of the recorded instrument was made evidence in the same manner and with the like effect as the copy of deeds acknowledged and recorded since the change of government. This law was unnecessary, and passed in ignorance of the law in force, and with the belief that without this law a copy was not evidence. But this law made the original of an act thus recorded evidence, because a copy could not, according to this law, be read, without accounting for the original. The endorsements of the recorder on this contract, and the certificate of record, are evidence conclusive that this contract was found among the Spanish archives, and the

original recorded and delivered under this act, for the recorder shall be presumed to have done his duty. He charges for the search, and without this act he had no authority to record this contract.—Geyer's Digest, p. 332.

"This act is repealed by the revised code of 1835; but it should have been received in evidence, under the act of 1839, on Evidence, p. 42.

"No evidence was rejected that should have been received. The tabular statement, said to have been extracted from the books of recorder Bates, should not have been read in evidence—

"1st. Because it does not purport to be a full copy of all the evidence on which he acted.

"2d. Because Bates had no power to confirm lands, but only to report them for confirmation.—See act of Congress for the adjustment of land claims in Missouri, passed in 1812, '13, '14.

"These reports were confirmed by an act of Congress of 1816. A copy of Bates' reports is to be found only in the office of the commissioner of the general land-office, and a copy from this office is the only evidence that could be received to prove what was confirmed by the act of 1816, unless a full copy from the office of the recorder, showing the nature of the claim, the evidence before the recorder, and his decision thereon, might be received.

"But Bates had no power to act upon, or recommend for confirmation, any claim exceeding in extent a league square. The law never contemplated that a larger claim might be acted upon, and a part of it confirmed. (Geyer's Digest, acts of 1807, p. 464; act of 1813, p. 472; acts of 1816, p. 478; also, *Strother vs. Lucas*, 12 Peters, 453, 454.) The construction of this act is, that no claim is confirmed by this act of 1816, except such as are contained in the report of the recorder, made in pursuance of the laws under which he acted.

"There was no error in rejecting the alleged deed to Chouteau.

"1. Because it was never acknowledged or proved, or recorded according to any law now or heretofore in force.

"2. It was not made before any officer of the Spanish government; for in 1804 Spain had no jurisdiction here, and if Delassus acted as an officer at all, he acted as an officer by permission and sufferance of our government.

"3. There is not only no evidence that the deed was ever among the Spanish archives, but that it could not have been there, because by law it could not have been left there except under our act of 1815, which was repealed in 1825, and Ruland's certificate shows that it was filed for record in 1837. If this deed were recorded betwixt 1815 and 1825, the fact would appear by the recorder's certificate, and if it were after 1825, it must by law still have remained there, because after that time the recorder had no power either to record it or to let it go out of the office; after 1825, a copy of the notarial act not recorded according to the act of 1815 was the only legitimate evidence, and a copy in French was produced by the defendant, and if the plaintiff did not have it translated and read to the jury it was his fault. All the evidence, then, proper to be read was there for the jury to consider, if the plaintiff wished to avail himself of it. But the deed could not be read, according to our law, without identifying the grantor to be the

original claimant of the land in dispute, and the proof is that the deed was not from the original claimant, but from a boy, the son of Charles Tayon, if from any one.

“There is another reason why this deed should not have been read in evidence—whether, in fact, it were the deed of the old or young Francis Tayon? One-half of the land in dispute, by virtue of the marriage contract, vested in the defendant, and her first husband could only convey his interest in such land, that is, one-half of it.”

Mr. Bird then tells of the three divisions of property under the Spanish law, which, as I consider it irrelevant to this case, I will pass it over.

He then proceeds thus:—“The concession to Tayon was special in its location; it was surveyed prior to the 10th March, 1804; it was made by a proper officer, and duly registered. Under our statute regulating the action of ejectment, this survey of itself, and proof of the marriage contract, and the marriage made out, the plaintiff’s right of possession according to the principles established by various acts of Congress in relation to land claims originating under the Spanish government, a special call in the concession for a particular piece of land, or a survey made prior to the 10th of March, 1804, was regarded as separating the land so conceded from the king’s domain, it thereby became private property, and did not pass to the United States by the cession of Louisiana.—See the case of *The United States vs. Perchman*, 7 Peters’ Reports, from p. 86 to 91; and *Smith vs. The United States*, 10 *Ibid.*, 330, 331.”

He admits, that “The case of *Strother vs. Lucas* may be relied on as an authority that Francis Tayon and widow have forfeited all claim to the land sued for by failing to file notice as required by law, and that the confirmation of 1816 must enure to the benefit of Chouteau, who did file notice.” This decision, in this particular, was, he says, “not in accordance with the opinion of the minority of the court; it is contrary to all the decisions on the same point in Louisiana; it is thought to be unsatisfactory to the bar generally, to the public, and to Congress. It has long been the settled opinion in Louisiana, settled by a series of able judicial decisions, and which decisions are by the bar deemed to be correct, that a confirmation amounted to a mere relinquishment by the United States of their interest in the land confirmed, and left it to the courts to determine between adverse claimants who had the better title. This is well known to have been the unanimous opinion of the late board of commissioners.” Chief Justice Taney’s opinion, who had been counsel for Strother, and did not sit in his case, is also alleged to be adverse to the decision of the Supreme Court of the United States.

The most material point necessary to be settled in order to decide this case, as it seems to me, is this:—What is the effect of a confirmation by the act of Congress of 29th of April, 1816, on the recommendation of the late recorder of land titles, successor to the powers and duties of the first board of commissioners, established by the act of Congress of 2d March, 1805? By the fourth section of this act it is provided, that “persons claiming lands in the territory by virtue of any legal French or Spanish grant made and completed before the first day of October, 1800, &c., may, and every person claiming lands in said territory shall,

&c., deliver to the register of the land-office, or recorder of land titles within whose district the land may be, a notice in writing, stating the nature and extent of his claim, &c."

The fifth section of that act provides, that "each board, or a majority of each board, shall have power to hear and decide, in a summary manner, all matters respecting such claims; also, to administer oaths, to compel the attendance of, and examine witnesses and such other testimony as may be adduced; to demand and obtain, from the proper officer or officers, all public records in which grants of land, warrants, or orders of survey, or any other evidence of claims to land, derived either from the French or Spanish government, may have been recorded; to take transcripts of such record or records, or of any part thereof; to have access to all other records of a public nature relative to the granting, sale, transfer, or titles of lands within their respective districts; and to decide in a summary manner, according to justice and equity, on all claims filed with the register or recorder, in conformity with the provisions of this act," &c.

Thus we see, that persons having French and Spanish grants may deliver a notice, while those having incomplete grants are required to do so.—Section fourth, as above.

By a proviso to this fourth section, "where lands are claimed by virtue of a complete Spanish or French grant, it was not necessary for the claimant to file any other evidence of his claim recorded, except the original grant or patent, together with the warrant or order of survey, and the plat."

The lieutenant-governor tells us, in terms plain and explicit, that this is not a complete title, for he directs the surveyor, Don Antonio Soulard, to put Tayon into possession, to draw him a plat of his survey, deliver it to him, with his certificate, in order to serve him to obtain the concession and title in form from the intendant-general, "to whom alone (he says) corresponds, by royal order, the distributing and granting all classes of the royal domain." This is Mr. Bird's own evidence of the law of his case. But we have higher evidence than the declarations of the lieutenant-governor. At page 530 of the second volume of the land laws, we find it ordered by the King of Spain that the governor-general of Louisiana alone be authorized to grant lands. At page 537 of the same commences a correspondence betwixt Morales, intendant-general of Louisiana, and Manuel Gayoso Delermos, governor of that province, from which we find that in 1797 the right to grant land was transferred from the governor to the intendant of Louisiana. The lieutenant-governor, then, residing at St. Louis, had, under the Spanish authority, no right to grant land, as he himself declares, and as is also evident from the authorities above referred to.

Mr. Bird, then, is altogether mistaken in his supposition, that a special call in the concession of a particular piece of land, or a survey made prior to the 10th of March, 1804, was regarded as separating the land conceded from the king's domain in all cases, and that the land so conceded did not, in all cases, pass to the United States by cession of Louisiana to the United States, and the case of *Perchman vs. The United States* does not support him. In that case the land was granted by the governor of Florida, who had a right to grant, and did grant, by

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giving a patent for the land. There is also a difference in the language of the treaty with Spain and that of France, as appears by the same case, *United States vs. Perchman*. The United States, then, were placed on the same ground on which Spain stood before she ceded Louisiana to France. This person, (Tayon) or his assignee, was bound in a reasonable time to apply to the intendant of Louisiana for a grant for this land; and the United States, succeeding to all the rights of Spain, had the right to prescribe within what time, and on what terms, this complete title, called a patent, might be obtained. They did prescribe the conditions, and by several acts of congress extended the time for applying. The powers of the recorder under the act of 13th June, 1812, have been shown to be the same as those of the board of commissioners to which he succeeded.

The fifth section of the act of 2d March, 18 5, after giving to the board the authority to demand and obtain from the proper officer all records in which grants of land, &c., derived either from the French or Spanish government may have been recorded, &c., directs also that they shall have access to all other records of a public nature relative to the sale, transfer, grants or titles of land, and to decide in a summary manner, according to justice and equity, on all claims filed with the recorder.

Thus we see that the board were to have access to other records than those in which the grants of land, warrants, or orders of survey, &c., derived either from the French or Spanish government, were contained. These other records to which they were to have access related to the granting, sale, transfer, or titles of land, one could naturally suppose, betwixt individuals, and on the claims they were to decide according to law and equity. Those who failed to file their claims within the time prescribed were for ever barred. That Congress had the power to subject these claims to the possession of land to the summary tribunal for decision, I cannot doubt, and that, by the language above quoted, they did so, can hardly be doubted by any person who will take the trouble to read the law. Tayon and his alienee had already shown an utter disregard of the authority of Spain in delaying, from the year 1799, to demand a complete title. The United States had the same right to take advantage of their neglect that Spain had; and can it be doubted that Spain might, by law, have required the claimants to submit to the action of the intendant of the province within a prescribed time, their claims, to be decided on by the intendant, not only as against the government, but as betwixt vendor and vendee? in no other way could these claimants be forced to come in. We have seen that it required nearly thirty years to have all those claims presented. When the last board was constituted, those lands had become more valuable, and Congress prescribed a different rule: the confirmations were to the original grantee of the government of Spain, or his legal representative, leaving the legal representative to be ascertained by the courts.

The Supreme Court of the United States, in the case of *Strother vs. Lucas*, has decided that the confirmation enures to the benefit of the confirmee. But, says Mr. Bird, the minority of the court did not concur in this opinion, and it is well known that Mr. Chief Justice Taney, who had been of counsel for Strother, thought the decision incorrect. It is not a very strange thing that a lawyer who has lost his

case, should think his client injured. I have rarely known an instance of an attorney or counsellor at law being satisfied with a decision made against the interest of his client. When all the judges do not concur in an opinion of the court, then the reasons of their dissent may be urged with a good grace on a re-argument of the case. So, when great lawyers think the case wrongly decided. But to say that a lawyer, whose client had lost a case, thought it wrongly decided, is to spend one's time in idle prattle; for no man who knows human nature would expect him to be satisfied with such decision. But the strongest argument of all was, that all the last board of commissioners thought the confirmation ought to enure to the benefit of the original grantee. I am apprized that one of those commissioners obtained a license to practice law with as much credit as is common, and for any thing known to me, he may have been very successful in his practice; but, although I lived from the time he obtained his license till his death, within twenty-five miles of his place of residence, I never heard that he ever obtained or ever sought for business: and I can say with much confidence, that he never even appeared in the Supreme Court of this State. I say nothing of the other commissioners, except that they were not lawyers.

As to the learned decisions on this subject in Louisiana, and the approbation of the intelligent bar, all tending to favor his construction of the law, I shall, as he has cited no case, pass it all, observing that I should not consider it any honor to any lawyer who had read the act of Congress, to have it said of him that he entertained the opinion which Mr. Bird here credits to the bar of Louisiana.

The opinions of our first commissioners have been passed over in silence by him, as if they were men entitled to no credit, that is, the first board who settled the construction of this law; which construction, too, was approved in a very decided manner by Congress, when, by the act of the 13th June, 1812, the same powers granted to the old board were continued to Mr. Bates, late recorder of land titles, who had been one of that board, and continued, too, after the construction given to their powers were officially known to Congress. It was again approved by Congress, when all the cases reported by Mr. Bates for confirmation were confirmed by Congress, as he recommended to the alienee of the original grantee of Spain. Mr. Bird well knows, that both Lucas and Bates were men of eminent abilities; that they were lawyers; and he has had also the means of knowing that Donaldson was a distinguished lawyer, and that Penrose, though never a practising lawyer, was a well-educated man; that he studied law with a view to the practice.

But, in his brief, Mr. Bates is treated rather more uncereemoniously than a sheriff is treated by a well-matured lawyer, when his return on a writ is sought to be amended. These are the authorities to show that the case of *Strother vs. Lucas* was correctly decided. But no man who reads and understands will therefore contend that the confirmations under the act of 1836 will enure to the benefit of Chouteau, assignee of Tayon, because the confirmations on the recommendation of Mr. Bates, in 1816, did. A very different language is used in the act of 1816 from that of 1836. The act of 1836 confirms to Tayon or legal representatives, and the act of the 29th of April, 1816, confirms simply the claims reported by the recorder

for confirmation. I have shown that the act of 2d March, 1805, gave the first board, and the recorder, their successor, the power to ascertain the actual owner of the land, by evidence taken before them. They did so; Congress, officially informed, in the year 1812, that the confirmation was made to the alienee of the original grantee, continued the powers of the first board of commissioners to the late recorder, who was a member of that board, thereby approving the decisions of the old board, and showing their wish that the recorder, under the same powers, should give the same construction to those powers which the board had given: yet Mr. Bird, after telling us, I know not on what authority, that Mr. Chief Justice Taney, the counsel of Strother, did not approve of the decision in *Strother vs. Lucas*, says, "When the act of July, 1836, was passed, this point was much debated by legal men and by members of Congress, and, as he is informed, it was so little a debateable question, that the law of 1836 was passed, containing different provisions from any former act on the same subject." I understand that when Congress passes an act, they are supposed to understand the subject, and that whether they do or not, the courts are to obey their written will. Indeed, there are always some good lawyers in Congress who will not suffer an act to be passed without explaining the subject. But as for the opinions of individual members of Congress, they are like the opinions of other men. If common sense cannot teach us that every man who is elected to Congress does not thereby become a lawyer, we have many living evidences of the fact.

When the act of the 29th of April, 1816, was passed, I presume there were in Congress many good lawyers.

I know of no reason why the opinion of the commissioners, Lucas and Bates, should not be as sound as any man's on this subject. It being clear, I think, that a confirmation made under the act of the 29th April, 1816, on the report of the late recorder of land titles, enured to the benefit of the confirmee, Pierre Chouteau, it becomes material to enquire whether the extract from his books, certified by the then recorder, was properly rejected by the Circuit Court when offered in evidence by the defendant.

This is the statute law of Missouri:—"Copies of confirmations had before the board of commissioners for the adjustment of land claims within this State, or before the recorder of land titles, duly certified by the recorder of land titles, or by the person who shall, by law, have the custody of the books and papers containing such confirmations, shall be received as evidence."—P. 251, sec. 7, of the Digest of 1835, title, "Evidence."

As before observed, these are called confirmations before the recorder of land titles because the testimony was taken before him, and on his recommendation they were confirmed by the act of Congress of 29th April, 1816. These extracts have been constantly read in this Court, and this is the first time they ever were objected to, because the recorder recommended only for confirmation.

The form, as above observed, was tabular, and it is not pretended that there is any defect on the face of it, or that it is not duly certified, "but because—

1st: "It does not purport to be a full copy of all the evidence on which he acted.

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2d: "Bates had no power to confirm lands, but to report them for confirmation, (referring to the acts of Congress;) these reports were confirmed by the act of 18 6. A copy of Bates' Reports is only to be found in the office of the commissioner of the general land-office, and a copy from this office is the only evidence that could be received of what was confirmed by the act of 1816, unless a full copy from the office of the recorder, showing the nature of the claim, the evidence before the recorder, and his decision thereon, might be received.

3d: "Bates had no power to act upon, or recommend for confirmation, any claim exceeding in extent one league square."

The two first objections are, in fact, but one. It may be observed, that the act of Missouri, making the confirmation evidence, does not require the evidence on which the recorder acted to be copied. It would have been worse than idle to require a copy of the evidence.

Congress had already confirmed his reported cases, and they had been satisfied with the evidence on which he acted in making his recommendation; and neither the State of Missouri, nor any other State in the Union, had the right to decide on the sufficiency of the evidence. But he says a copy of Bates' Reports is only to be found in the office of the commissioner of the general land office. If the certificate of the present recorder of land titles is to be accounted any evidence of truth here, as the law of 1835 seems to make it, we have on this record a copy of Mr. Bates' report in this case. The original appears now to be in the recorder's office, and what is found in the office of the commissioner of the general land office is, I suppose, an exemplification of what remains in the office at St. Louis, and it being made out by an officer intrusted for such purpose, is as much an original as the five small books remaining at St. Louis. This extract, then, from the recorder's books, purporting to be a recommendation of a confirmation to Pierre Chouteau under Francis Tayon, ought to have been received in evidence. This copy, then, being good evidence, establishes the right of Pierre Chouteau to the whole of the league square recommended for confirmation by the late recorder, Frederick Bates, and confirmed by the act of Congress of 29th April, 1816, without the aid of any deed from Tayon to Chouteau; for before Mr. Bates could have recommended this league square for confirmation, he must have ascertained the authenticity of that deed, and we are bound to admit that he did his duty after his acts are approved by Congress. This, as has been above shown, he had power to do, and Congress having confirmed the claim on his recommendation, we must presume they were satisfied, and it was their duty to guard the rights of Tayon, and if they have neglected that duty, I am yet to be informed by what authority the State courts can assume the right to correct the errors or neglects of the tribunals of the United States. But Mr. Bird says, that the action of the late recorder, on a claim to a tract of land of more than one league square, is void. The law says the commissioner shall have power to decide, amongst other cases, where the claim is for a tract not exceeding a league square. But Mr. Chouteau, the claimant, was willing to accept a league square, and trust to the justice or liberality of the government for the remainder, and the recorder recommended one league square of this land for confirmation; and Congress, who have the uncontrolled disposition of this land,

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chose, on his recommendation, to confirm it. This they could have done without his recommendation, and his recommendation most certainly could not divest Congress of the power which they before had. But to show that the confirmation is void, Mr. Bird, after referring to the law, cites the case *Strother vs. Lucas*, (12 Peters, 453, 4.) If such has been the decision there, then, whatever may be my opinion of its correctness, I admit that it is the duty of this Court to submit. At page 453 of 12 Peters, we are told, that "the plaintiff (Strother) gave in evidence two opinions of the recorder of land titles, confirming to the representatives of Gomache and Kiercerean the forty arpent lot of each, and directed each to be surveyed; but did not offer the confirmations to Chouteau, by the board of commissioners, which were given in evidence by the defendant."

It must here be observed, that this land, the subject-matter of the suit, had been, in January, 1838, confirmed by Penrose and Bates, commissioners, to Auguste Chouteau, under whom Lucas claimed, and that Mr. Bates afterwards (inadvertently it must have been) confirmed, or recommended for confirmation, the same land to the representatives of Gomache and Kiercerean. But the judge proceeds—"the plaintiff (Strother) claimed under the former, the defendant under the latter: (Chouteau:) that of the plaintiff will be first considered."

"By the 8th section of the act of the 13th June, 1812, the recorder of land titles was invested with the same powers, and enjoined to perform the same duties, as the board of commissioners, which was then dissolved, in relation to the claims which might be filed before the 1st of December, 1812, and the claims which may have been heretofore filed, but not acted on by the commissioners; except that all his decisions shall be subject to the revision of Congress." The judge then adds—"but these confirmations cannot avail the plaintiff as claimant under these or any other acts of Congress, because, first, the authority of the recorder of land titles was, by the express terms of the act, &c., confirmed to those claims on which the board of commissioners had not previously acted, from which it follows, that after the commissioners have made a confirmation of a specific claim, the action of the recorder is merely accumulative, and so inoperative; or if adverse, merely void, as an assumption or usurpation of power in a case on which he had not jurisdiction, and his action must be a mere nullity." It is then added, that "If Congress could, it never did give him any authority to supervise either the acts of the commissioners or the confirmations of the law."

In the case cited Congress had, by the confirmation of the board of commissioners, parted with all its right to the land confirmed, and without a violation of the right of Chouteau, acquired by such confirmation of the board of commissioners, it could not authorize the recorder of land titles to take up the same case to adjudicate, out of Chouteau, that title which had been acquired by the confirmation of the board of commissioners. This authority, then, is not in point. Nothing hindered Congress to confirm the league square to Chouteau; the title to this land had not passed out of Congress, as in *Strother vs. Lucas*, and Congress had full power to confirm it.

Mr. Pierre Chouteau, then, is by law, and by virtue of this recommendation for confirmation by Mr. Recorder Bates, entitled to the league square of land without

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the aid of the deed of Tayon, inasmuch as he must be presumed to have found every fact necessary before he recommended the land for confirmation.

The marriage contract was, for the reasons given by Mr. Bird, (9 Peters, 625, 626) admissible in evidence.—*Mauri vs. Johnson*, 13 Johns., 58, referred to 348 of Phillips' Ev., New York edition of 1816.

Here might end the examination of the evidence rejected, but as the case is fairly before the court, I will examine why the deed from Tayon to Chouteau may not also be admitted in evidence.

This deed purports to have been executed on the 3d day of January, 1804, before the proper authority, to wit, the lieutenant-governor—there being no notary-public—at which time, Mr. Bird says, Spain had no jurisdiction here. His survey appears to have been returned on the 25th day of February, 1804; and for his purposes, in his written argument, he says the Spanish government lasted here till 10th March. Yet there was no Spanish authority here, for the purpose of taking the acknowledgment of the deed from Tayon to Chouteau, on the 3d day of January, 1804, nearly two months before his survey was made.

Again, he says, "There is not only no evidence that this deed was ever among the Spanish archives, but it could not have been there, because by law it could not have been left there, except under the act of 1815, which was repealed in 1825, and Ruland's certificate shows that it was filed for record in 1837." When the deed was executed, on 3d January, 1804, it became a record, the property of the government of Spain, and on the change of government, this deed, among other papers and documents, was passed over to the recorder of St. Louis county. On 22d December, 1815, an act was passed, making it the duty of the recorders in the several counties to record all and any papers and documents found in their respective offices, which were received from the Spanish authorities, at the change of government, on the application of any persons for that purpose, &c. There was a subsequent provision, that this applicant should pay the recorder's fees. Now, if this deed had not been found there, or have been deposited there before the change of government, then it could not, under the act of 1815, have been recorded. Accordingly, Mr. Ruland certifies that the deed was truly recorded in Levie Terrein, in his office. He then gives the endorsements made on the deed, in the Spanish language, and makes another certificate, that it was filed for record, in his (Ruland's) office, by M. P. Leduc, on 24th May, 1837. If Mr. Ruland had been a lawyer, well read in the act of 1815, I suppose he would have made on this deed an endorsement in the language of the act of 1815, in words of this import, to wit: that this deed was recorded in his office, on the application of M. P. Leduc, made on the 24th May, 1837. So the deed carries on its face all the marks of authenticity that the marriage contract does. The original was produced, and whether wrongfully or rightfully, out of the office, is not now a subject of enquiry.

But this deed could not have been made by Francis Tayon, the deceased husband of the plaintiff, Widow Parks, because the maker of the deed signed the deed in a good business hand, in the year 1804; and Francis Tayon, to whom this land was conceded in 1799, could not write, but made his mark to the petition presented to

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the lieutenant-governor. But Francis Tayon, the deceased husband of the widow Pelagia Parks, appears to have signed the marriage contract in the year 1795, four years before the date of the concession, in the same good business hand that the deed was signed in. Then, if the deed could not have been made by Francis Tayon, to whom this land was conceded, because, in 1799, four years before the execution of the deed, this Francis Tayon could not write, for much better reason, Francis Tayon, party to that marriage contract, who could write in 1795, cannot be Francis Tayon who could not write in 1799. The depositions of Mr. Cabana and Mr. Ceri were taken nearly about the same time—Cabana's in 1840, Ceri's in 1839, a few months previous. Mr. Cabana states that Francis Tayon, the son of Charles, was then, in 1840, about thirty-six years old, that is, he must have been, at the date of that deed, one or two years old, and Mr. Cabana lived in St. Louis, where Francis Tayon, husband of this widow, plaintiff, lived. The other Francis might then have been at his mother's breast, where his father lived, viz., in St. Charles. According to the testimony of Mr. Ceri, the younger Francis Tayon might have been four or nine years old, and could not then probably, write the good business hand that is imputed to him at the date of that deed. Mr. Cabana states that, at the date of the deed, in St. Louis, where Francis Tayon, "hijo," lived. We are not told where Mr. Ceri lived, and cannot, therefore, duly appreciate his opportunities for getting information. If he had lived in St. Louis, it would certainly have been proved; as it was not proved, it is to be presumed he did not live there. But the testimony of both Demun and Cabana shows that the original Spanish word means son, and is used in reference to his having a father living. But Mr. Bates took the proof of the deed, and it is all settled, by the act of Congress of 1816, that this confirmation enures to the benefit of Pierre Chouteau, and any action of the last board of commissioners, on the land confirmed on the report of Mr. Bates, must be void, because, by the act of 29th of April, 1816, Congress had divested itself of all title to the land recommended by him for confirmation. But unless the jury should believe that Francis Tayon, who signed with his own name the marriage contract, and Francis Tayon, who made his mark to the petition for the land, are, on that account, or for some other good reason, different men, then the widow Parks will be entitled to the one-half of the remaining part of the land, not confirmed on the report of the late recorder, Bates; for the remaining part of the land being confirmed to Tayon or his legal representatives, this confirmation relates back from the time of the confirmation, when Tayon first had the inchoate right of property in it, to the time of the concession, which merely gave Tayon the right to acquire property in that land.

Of the instructions asked by the plaintiff, and given by the court, the first should not have been given. It assumes that the land in contest became private property from the time it was surveyed. The lieutenant-governor declares himself that he had no power to grant land. I have also sufficiently shown, from the second volume of the land laws, that the power of granting land since the year 1798, resided with the intendant-general of Louisiana; also, it is well known that the United States never recognized any such claim to be valid until it was confirmed.

2. The second instruction, standing alone, is well enough. But the court ought

to have told the jury that an action could not be maintained against any one holding under an act of Congress.

3. The third instruction was correctly given, so far as it relates to the excess of 10,000 arpents over one league square, confirmed on the recommendation of the recorder.

4. The fourth instruction was altogether idle. The Congress of the United States have power to confirm any land claim, whether that claim be reported by the recorder or not, so that even if his recommendation be not within the contemplation of the act of Congress of 13th June, 1812, (which can by no means be admitted,) yet still the confirmation by the act of 29th April, 1816, is valid.

Of the instructions asked by the defendant, and refused by the court, the first was properly refused, because it required the jury to decide the lawfulness of the plaintiff's possession.

The second was rightly refused, for she might have been ousted by the defendant, and he might have been co-tenant with her.

The third was correctly refused, because, whether the marriage was lawful, and what rights accrued to the plaintiff from such marriage, it belonged to the court to decide.

The fourth was also correctly refused, because it required the jury to decide the law.

The fifth also should have been refused, because what is a contract is a matter of law, and therefore proper for the court only to decide. I am not disposed to think the two words of Latin ought to vitiate the instruction if it had been otherwise good: for those might be omitted without any injury to the sense, and they are so common that we understand them as well almost as we do the English. It was, however, but a waste of time to ask such a question, for the most dull would know that a marriage must have taken place to give validity to the contract, and there was an abundance of evidence to raise the presumption.

The sixth ought also to have been refused, because there was sufficient evidence to induce a jury to find a marriage.

The seventh ought also to have been refused for the same reason as the sixth, there being same evidence.

The eighth, ninth, and tenth instructions were not authorized to be given by any evidence in the cause, because the evidence of the recorder was improperly excluded by the court, and also the deed from Tayon to Chouteau, and consequently the depositions of Demun and Cabana.

The eleventh instruction should have been given. The word "lawful" is superfluous, for the commissioners could have no authority unless what was given by law, and consequently that authority must be lawful.

For the reasons above given the judgment of the Circuit Court ought, in my opinion, to be reversed.

NAPTON, Judge.—The confirmation to Chouteau, by the act of the 29th April, 1816, enured to the benefit of the confirmee, and the certified copy of the recorder's confirmation was improperly rejected.

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The admissibility of the marriage contract was considered and decided in the case of *McNair vs. Dodge*, 7 Mo. Rep., 408.

Inasmuch as the court rejected the evidence of the defendant, showing the confirmation to Chouteau of a league square, the judgment must be reversed, and the cause remanded.—*Scott, Judge*, concurs with Judge Napton.

MCCURDY vs. BROWN AND GIBSON.

1. The 1st section of the act of February 20, 1835, concerning "Costs," (R. S. 1835, p. 127,) embraces those cases only in which the name of the real plaintiff is not upon the record, as when an official bond is given to the State, and suit is instituted in the name of the State to the use of the party suing. Where the proceeding is against a public officer, or against such officer and his securities, by motion in the name of the real plaintiff, the act does not require that security for costs should be given before the proceeding is instituted. The act does extend to cases commenced before a justice of the peace.
2. The 5th section of the act of January 4, 1841, concerning the liability of county officers on their official bonds, (Session acts of 1840, '41, p. 31, 32,) providing that "persons injured by the neglect or misfeasance of any such officer may proceed against such principal, (or) any one or more of his securities, jointly or severally, in any proceeding authorized by law against such officer for official neglect or injury," does not render liable the securities of a constable to the penalty imposed upon such officers for failing to return an execution, by the 8th section of the act of March 17, 1835, concerning constables. (R. S. 1835, p. 117.) Proceedings under this section are confined to the constable; the sureties are not embraced within its provisions.
3. The 5th section of the act of 1841 does not extend the liability of securities: it only gives a more summary remedy against them in cases in which they were liable at the time of the passage of the act.

APPEAL from Jasper Circuit Court.

WINSTON and PHELPS, for Appellants.

The act respecting constables, (sec. 8, p. 117,) authorizes a proceeding by motion against a constable, for failing to return any execution.

The act of 1840—41, p. 31, 32, sec. 5, provides, that "persons injured by the neglect or misfeasance of any such officer may proceed against such principal, or any one or more of his securities, jointly or severally, in any proceeding authorized by law against such officer, for official neglect or injury."

The failing to return the execution was official neglect of the constable. The law gave the remedy by motion against the constable only. The last act extends this remedy to the injured party, against the constable and his securities.

The law nowhere requires a bond for costs to be filed in a proceeding by motion against a constable.

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The judgment of the Circuit Court, in dismissing the said motion, was correct, and should not be disturbed, for the following reasons: because—

1. The proceeding by motion, against the constable and his securities, for double the amount of the execution, is not authorized by law. Digest Laws of Mo., p. 117, sec. 8; also, p. 368, sec. 20-23.
2. The recovery by motion against a constable, for failing to return an execution, is double the amount of the same; but in no case can the recovery against the securities exceed the amount of the execution, with interest thereon at the rate of 100 per cent. per annum.
3. The plaintiff failed to file a bond for costs.—Rev. Code of 1835, p. 127.

SCOTT, J., delivered the opinion of the Court.

This was a proceeding by motion, instituted by McCurdy, against Brown, a constable, and Gibson, his security, on his official bond, under the act of January 4th, 1841, entitled, "An act the better to secure the liability of county officers on their official bonds," for the failure of Brown, the constable, to return an execution. McCurdy recovered against Brown and Gibson double the amount of the execution. An appeal from this judgment was taken to the Circuit Court, where, on motion of Gibson and Brown, the cause was dismissed, because no security for costs had been given, and because the act regulating constables did not give such proceedings against the constable and his sureties.

The 5th section of the act of 4th January, 1841, provides, that persons injured by the neglect or misfeasance of any county officer may proceed against the principal, or any one or more of his sureties, jointly or severally, in any proceeding authorized by law against such officer, for official neglect or injury. The 8th section of the act concerning constables prescribes, that if any constable shall fail to return any execution, he shall forfeit and pay to the plaintiff double the amount, to be recovered by motion, before any justice of the peace of his township, giving five days notice thereof, in writing, to said constable. This proceeding against the constable and his surety was founded upon the two foregoing provisions of law.

In regard to the question as to the security for costs, we are of the opinion, that the first section of the act concerning costs does not apply to this proceeding; it is neither within its letter nor spirit. This is not a proceeding upon an official bond. The act was intended for cases in which the party used the name of another in suing. Where the name of the real plaintiff is not upon the record, as a party, as where an official bond is given to the State, a person aggrieved by the violation of its conditions, bringing a suit, does it in the name of the State; in such cases, it is necessary to give security. So it may be when bonds are given to officers for the use of another. In these cases, inasmuch as the real party does not appear as such upon the record, and the name of the State or officer is used for form's sake, security for costs is required. In the case under consideration, the party who instituted the proceedings appeared as plaintiff on the record. Neither the State

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nor any officer was the formal plaintiff: moreover, the section above referred to evidently contemplates suits commenced in the Circuit Court, and in its terms there is no reference to justices' courts; nor is the necessity of applying that act to justices' courts conceived, as the act regulating those courts has provided when and in what cases security for costs shall be given. But it is a conclusive answer to the objection of a want of security for costs, that this is no suit or proceeding on an official bond.

As to the question, whether the constable's securities are liable, under the 5th section of the act of 1841, to the penalty imposed on constables, for failing to return an execution: by the 8th section of the act relative to constables, we are inclined to the opinion that they are not. When a statute gives a penalty against a constable or other officer, and does not make the securities liable thereto, by express words, we know of no principle which would subject them to its payment. The obligation of sureties is always construed strictly, and never extended beyond the fair scope and import of its terms. The act of 1841 takes effect from and after its passage. The fifth section of that act does not profess to act prospectively on bonds thereafter given, but it relates to bonds then in force, as well as those to be given in future. When the security in this case executed the bond by which he is bound, the liability he thereby incurred was fixed and ascertained by law. Can the legislature, then, by a subsequent act, say that this liability shall be increased? the existence of such a power in the general assembly cannot be maintained under our form of government. If authority was wanting to the legislature to pass such a law, in construing their act we should avoid a construction which would make them guilty of a usurpation of power. The fifth section of the act of 1841 does not, in terms, pretend to interfere with the liability of securities; its whole scope and design is to give a more speedy remedy against them, an object clearly within the constitutional competency of the general assembly. Its aim is to enable a party aggrieved by a neglect of duty in an officer, to recover, in a summary manner, that which he was before entitled to recover, but in a more dilatory and expensive form of procedure. The 8th section of the act relative to constables does not pretend to make the sureties liable for the penalty therein denounced against constables, and there is no necessity, and, as we think, no warrant in any law or principle of law to make them so.

The 20th section of the 7th article of the act concerning justices' courts gives a summons against a constable for failing to return an execution, and subjects him to a penalty of 100 per cent. per annum on the amount of the execution, for such failure. The last section of that article prescribes that this recovery may be had against the constable alone, by a proceeding on a summons, as before directed, or that the party may, by action of debt on his bond, have the same recovery against him and his securities. Inasmuch as the penalty is, by this act, expressly given against the sureties, and as by the terms of the act it was only recoverable by action of debt on the bond, the act of 1841 was intended to give the party aggrieved a more speedy and less expensive remedy, to obtain that to which he was by law entitled.

Thus, as we find a provision on which the act of 1841 can operate—a provision

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extremely liberal to plaintiffs in executions—we cannot see the necessity of extending its operation, by a forced construction, to cases not within its letter, and to an extreme to which the legislature, we cannot suppose, ever would have gone. Judge Napton concurring in this opinion, the judgment of the court below is affirmed.

TOMPKINS, Judge, dissenting.

Flemming B. McCurdy moved, before a justice of the peace of Jasper county, for a judgment against Willie D. Brown, a constable of a township in said county, and Teyon Gibson, the security of said Brown, in his official bond, for double the amount of an execution delivered to said Brown, and which he had failed to return. Judgment was given before the justice, for McCurdy, and the defendants, Brown and Gibson, appealed to the Circuit Court. When the cause came into the Circuit Court, Brown and Gibson, appellants there, moved to dismiss it. It was dismissed on their motion, and exceptions taken to the decision of that court, and to reverse the judgment of the Circuit Court, this writ of error is now prosecuted.

The reason assigned for the dismissal of the cause, in the Circuit Court, was, first, that the plaintiff, before he commenced his proceeding, did not file a bond with security, in conformity with the provision of the 1st section of the act concerning costs, p. 127 of the Digest of 1835; and, second, the proceeding by motion, against the constable is not authorized by law.

1. The 1st section of the act concerning costs requires that in all actions for the use of any person, the plaintiff or person for whose use such action is to be commenced, shall, before he institutes such suit, file with the clerk of the Circuit Court, in which the action is to be commenced, a bond, &c., for costs.

By the act of 1835, three different remedies against constables are provided, first, one by motion, against the constable alone. If the constable fails on this motion, he forfeits and pays to the person moving, double the amount of the execution. (Sec. 8 of the act concerning constables, p. 117). Second, by summons against the constable alone, in which he may recover the amount of the money received, and 100 per cent. per year; (Digest, p. 368, sec. 20–22 of art. 7 of the act concerning justices' courts;) and, third, one may sue the constable and his securities, on the official bond, and recover, as in the aforesaid proceeding, by summons against the constable.

By the 5th section of the act entitled "An act the better to secure the liability of county officers, on their official bonds," p. 31 of the acts of 1841, it is provided, that "Persons injured by the misfeasance or neglect of any such officer, may proceed against such principal, (or) any one or more of his securities, jointly or severally, in any proceeding authorized by law, against such officer, for official neglect or injury."

Persons suing on official bonds, in the Circuit Court, are required to give bonds to secure costs. It is not provided in the statute that the plaintiff moving against a constable shall give security for costs, probably on account of the restricted jurisdiction of the justice; nor is one suing on a constable's bond before a justice

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of the peace, required to give bond for costs. (Sec. 4 of act respecting constables, Digest, p. 116. It is not, then, apparent why he should give security for costs, when he moves against both constable and security. The Circuit Court, then, in my opinion, committed error, in dismissing the case because security had not been given for costs.

2. The provisions of the act of 1841, above cited, are very broad. It should read "and" instead of "or," with which last word the blank in the 5th section is filled; but the meaning is, in my opinion, the same, with either of those words inserted. The injured person, then, may move against the constable and his securities jointly or severally, in any proceeding authorized by law, against such officer for official neglect or injury. The two remedies above-mentioned, given in the Digest against the constable alone, are for the same injuries, and I can see no reason why the last law should not be construed to give the injured person the right to choose either the one or the other, and if he choose to move against the constable and his securities, he ought, in my opinion, to recover 100 per cent., as he would have done had he moved against the constable alone.

In my opinion, the judgment of the Circuit Court ought to be reversed.

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1. In ascertaining the boundaries of lands purchased from the United States according to the government surveys, the boundary lines actually run and marked by the public surveyors are to be taken and considered as the true boundaries, although such marked boundaries may not correspond with the courses and distances. The sections and their subdivisions, thus ascertained, are to be considered as containing the exact quantity expressed in the returns of the surveyors, whatever may be the actual quantity contained in such sections and subdivisions.—See S. C., 6 Mo. Rep., p. 219.
2. In surveys of land, it is a well-settled rule that the courses and distances must yield to an ascertained corner or boundary; and although such corner or boundary may have been effaced or destroyed, yet if the locality can be established by real testimony it will prevail, and the courses and distances must yield.
3. When the boundaries of land are fixed, known and unquestionable monuments must govern, although neither courses nor distances, nor the computed contents, correspond with such monuments.

APPEAL from Ray Circuit Court.

LEONARD, *for Appellant.*

1. The testimony of H. McAfferty, which was offered by the plaintiff, and rejected by the court, ought to have been received.

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2. The instructions asked by the plaintiff, as to the boundaries of the half quarter section of land in dispute, were in conformity with the opinion of this Court, given when the case was last before this Court.— *Campbell vs. Clark*, 6 Mo. Rep., 221.

3. The instructions given by the Circuit Court, in lieu of the instructions asked by the plaintiff, were manifestly intended to induce the jury to find against the rule of law applicable to the case laid down by this Court, and so far as they are at all intelligible, are in direct hostility to that rule.

4. The finding of the jury is palpably against the evidence, and therefore the court erred in refusing the plaintiff a new trial.

KIRTLEY, *for Appellee.*

1. A purchaser, of the General Government, of a less quantity of land than a section, there being other purchasers and owners in the same section, should be entitled to an equal quantity of land with all others in the same section purchasing a like aliquot part.

A purchaser buying of the government—or deriving title from purchasers of the government—for a half quarter section of land, should be entitled to one-eighth of the whole section, whether the government surveyor had placed the half-mile marked trees on the exterior lines of such section at equi-distance from the marked corners or not.—*Walters vs. Commons*, 2 Porter's Ala. Rep., 38.

SCOTT, *Judge, delivered the opinion of the Court.*

This was an action of ejectment, brought by Campbell against Clarke, in which Clarke had a verdict and judgment.

It appears that Campbell was the owner of the east half of the south-west quarter of section 21, township 49, range 28; and that Clarke was the owner of the west half of the south-east quarter of the same section.

The division of the section, by a line running from one of the corners established by the public surveyor to the opposite corner, makes the half quarter section of Campbell contain $94\frac{1}{8}$ acres, and that of Clarke's, $64\frac{1}{8}$ acres. The question is as to the manner of subdividing the sections—whether the corners marked on the boundaries of sections by the public surveyor are to be regarded in subdividing a section among the several owners, or whether the same is to be divided by lines equi-distant from the several corners of the sections?

In making a survey of the twenty-first section, the surveyor reports, that in running the west line at 40 chains, he stopped and examined for quarter section corners, and found trees agreeing with the original field notes with the usual marks of quarter section corners, but neither the courses nor distances agreeing with the original field notes. Course continued 40 chains, making in all 80 chains, which brought him to a prairie. No sign of the original post or mound was to be seen. Thence east, and at 40 chains, found himself to be $20\frac{1}{2}$ links south of the old marked line. He then moved on to the old marked line, and searched

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for the quarter section corner, but could find no timber, either in the course or distance of the description called for in the field notes. Course continued 5 chains, $4\frac{3}{4}$ links, where a Spanish oak, lying down and much decayed, was found, bearing S. 61 deg., E. 50 links; also, a white oak lying down dead, bearing N. $55\frac{1}{2}$, W., 48 links. Course continued 34 chains, $94\frac{1}{4}$ links, making in all 80 chains—which brought him into an old improvement; no bearing trees to be found; all the timber having been destroyed in making the improvement, or by other means. Thence, north, his course exactly striking and following the old marked line, and at 79 chains, 56 links, he came to the beginning corner, falling about two feet west of it.

The original field notes of the survey of the south line of the said section, about which this controversy arises, called for post in mound, at the western corner. The witness trees of the middle corner were Spanish oak, 18 inches in diameter, bearing S. 61 deg., E. 50 links distant, and a white oak, 16 inches in diameter, bearing N. 42 deg., W. distant 40 links.

Many witnesses were introduced by the plaintiff, who, beyond all controversy, proved the fact that the corner claimed by Campbell was the corner established by the original surveyor of the lands, under the authority of the United States. A block from one of the witness trees to the middle corner of the south line of the section, which appeared to be of Burr oak, was exhibited to Hugh McAfferty, a chain-carrier and marker when the section was first surveyed, who testified, that he believed the marks in said block of wood to be his; that the markers were not well acquainted with the kind of timber on the Missouri, and that they usually called oak timber white oak when they made their corners in oak timber, particularly what is now called Burr oak, and Chinquepin oak. This evidence was objected to, and excluded by the court, to which an exception was taken.

The court, when requested, refused to instruct the jury, at the instance of the plaintiff, that the quarter section corners established by the surveyors under the United States were to be regarded as the proper corners of quarter sections; and that, however unequal a division of a section might be made, by running dividing lines from these corners, yet they must be adhered to; and instructed the jury, at the instance of the defendant, that they were to take the field notes in evidence, showing the length of the south boundary line of section 21, as being the true length of the line; and further, they are to take the field notes in evidence, as their guide in ascertaining the point equi-distant between the section corners, to ascertain the half-mile corner; and if they believe the half-mile corners do direct and point them to a point mid-way of said section line, as the place designated by the surveyor of the United States as the half-mile corner, there they should place it; and the presumption of law is, that the surveyor placed said corner where the law required him to put it, and if the bearing trees of said half-mile corner cannot be found as designated in the field notes, they should disregard any trees purporting to be bearing trees of said corner, which may be found on the south line of said section, which are placed 20 poles east of the middle or centre of said line.

This case was once before in this Court, (6 Mo. Rep.,) and it appears the same question was then involved which is now submitted to our consideration. We

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have no hesitation in pronouncing our conviction of the correctness of the opinion heretofore given in this cause, and are satisfied that although the law, as then declared, may, in a few instances, give some cause of complaint, yet, upon the whole, its expediency and propriety cannot be questioned.

We have been referred to the case of *Walters vs. Commons*, (2 Porter's Ala. Rep.,) as maintaining the doctrine, that in case of sections, the corners and boundaries are established by law, and the purchaser of an entire section must take by those corners and boundaries without regard to the quantity contained within it, whether it be more or less, than that required by law; but that, in reference to the subdivision of sections, when a controversy arises between different claimants, the exact quantity of the section is to be ascertained, and it is to be divided by lines running from courses equi-distant from the section corners, so that the holders of like subdivisions may each obtain the same quantity of the land. We think an examination of the several acts of Congress relative to the surveys of the public lands will expose the error of this opinion. By the ordinance of the 20th of May, 1785, the surveyors of the public domain were required to lay off the same into townships of six miles square, by lines running due north and south, and others crossing them at right angles, as near as may be. The plats of the townships are directed to be marked by subdivisions into lots one mile square, or 640 acres, in the same direction as the external lines; and the surveyors, in running the external lines of the township, were ordered, at the interval of every mile, to mark corners for the lots which were adjacent; always designating the same in a different manner from those of the townships.

The act of the 17th of May, 1796, required that townships should be subdivided into sections, containing as near as may be 640 acres each, by running through the same each way parallel lines at the end of every two miles, and by marking a corner of each of the said lines at the end of every mile. The act of the 10th of May, 1800, prescribes the mode of subdividing sections into half sections of 320 acres each, as nearly as may be, by running parallel lines through the same, from east to west, and from south to north, at the distance of one mile from each other, and marking corners at the distance of each half-mile on the lines running from east to west, and at the distance of each mile, on those running from south to north.

The act of the 26th of March, 1804, authorized the sale of the public lands in quarter sections, and after prescribing a mode of subdividing sections in half and quarter sections, directed that in every instance in which a subdivision of the lands of the United States, as surveyed in conformity to law, shall be necessary, to ascertain the boundaries or true contents of the tract purchased, the same shall be done at the expense of the purchaser.

The act of the 11th February, 1805, prescribes general regulations for dividing townships into sections, and subdividing such sections into half and quarter sections. The following is a summary of these regulations:—The lands are to be laid off in townships of precisely six miles square, by lines running due north and south, and east and west. On each of those lines, at the distance of one mile apart, corners are to be established for sectional lines. Parallel lines are to be

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run through the township each way, from each sectional corner, to the corresponding sectional corner on the opposite side of the township, on each of which lines sectional corners are to be established at the distance of one mile apart, which process divides the township into thirty-six sections. In running the exterior township lines, and also the interior sectional lines, intermediate half-mile posts or corners, equi-distant between the corners of the sections, are to be established as the boundaries of quarter sections. This act, then, prescribes, that all the corners marked in the surveys returned by the surveyor-general shall be established as the proper corners of sections and subdivisions of sections which they were intended to designate; and the corners of half and quarter sections not marked on the said surveys shall be placed as nearly as possible equi-distant from those two corners which stand on the same line. The boundary lines actually run and marked in the surveys shall be established as the proper boundary lines of the sections, or subdivisions of sections, for which they were intended; and the boundary lines which shall not have been actually run and marked as aforesaid shall be ascertained by running straight lines from the established corners to the opposite corresponding corners. Each section or subdivision of section, the contents whereof shall have been, or by virtue of this act shall be, returned by the surveyor-general, shall be held and considered as containing the exact quantity expressed in such return or returns; and the half sections and quarter sections, the contents whereof shall not thus have been returned, shall be held and considered as containing the one-half or the one-fourth part, respectively, of the returned contents of the section of which they make part.

From this review of the laws of the United States relating to the survey of the public domain, it will be seen, that at one time no subdivision of sections was made, it being divided into townships and sections only; consequently, no half nor quarter section corners were established on the public surveys. The act of 1800 authorized the sale of half sections, and prescribed a mode of ascertaining the contents thereof; and the act of 26th March, 1804, authorized the sale of the public lands in quarter sections, which were required to be surveyed and the contents thereof ascertained at the expense of the purchaser. Then came the act of 1805, above cited, which prescribed a mode of ascertaining the corners of sections and quarter sections at the expense of the United States. No lands were surveyed in this State until long after the act of 1805. The act of March 3, 1811, first provided for the survey and sale of land west of the Mississippi. At that time the quarter section corners were required to be marked on the surveys, and those corners were, by the act of 1804, to be taken as the true corners; and the provisions of that act, which required the corners of half and quarter sections not marked on the survey to be placed equi-distant from the two corners of the sections, were intended to be applied to surveys made prior to the time when the sale of half sections and quarter sections was authorized. Mr. Gallatin, then at the head of the treasury department, and to whom was entrusted the superintendence of the survey and disposal of the public lands, shortly after the passage of the act of 1805, in a letter of instructions to the surveyor-general, thus speaks of it:—"You will perceive, from the enclosed act, that the principal object which

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Congress have in view is, that the corners and boundaries of the sections and subdivisions of sections should be definitely fixed, and that the ascertainment of the precise contents of each is not considered as equally important. Indeed, it is not so material, either for the United States or for individuals, that purchasers should actually hold a few acres more or less than their surveys may call for, as that they should know with precision, and so as to avoid any litigation, what are the certain boundaries of their tract.

Now, that sections may be sub-divided amongst so many holders, and as valuable improvements are frequently made near lines sub-dividing sections, it would produce great confusion and litigation if the established corners were to be abandoned in subdividing sections, and lines were to be run equi-distant from the corners of sections, in order to subdivide it into quarter sections. The act of 1805 does not direct that the lines shall be so run, except when the corners and marks are not returned on the survey; when they are returned, they are as much respected as the corners of townships or sections, however distant from the centre of the line.

If this view of the law be correct, the court erred in refusing the plaintiff's instructions, and in giving the instruction set out above. That instruction, so far as the facts of this case were concerned, was a mere abstraction, and so much as directed the jury to disregard a corner twenty poles east of the centre of the line, clearly erroneous. Nor was the error cured by the subsequent instruction, that the boundary lines actually run and marked in the survey by the government surveyor are to be taken and considered as the true and proper boundary lines of the sections, or any less subdivision for which they were intended. The only matter before the jury was the credibility of the witnesses; and the jury should have been instructed, that if the witnesses were believed, the facts to which they deposed clearly entitled the plaintiff to recover. The instruction also seems to conflict with that well-settled rule in all surveys, that the courses and distances must yield to an ascertained corner or boundary; (*Preston vs. Bowmar*, 6 Wheaton's Rep.;) and although they may have been effaced or destroyed, yet if their locality can be established by oral testimony they will prevail, and the courses and distances must yield to them. (2 Bibb, 493.) When the boundaries of land are fixed, known and unquestionable monuments, although neither courses nor distances, nor the computed contents correspond, the monuments must govern. With respect to courses, variations of the needle, errors in the surveying instruments, and other causes, produce error; so mistakes as to the distances may arise from various causes. But monuments remain about them—there is no dispute; and what is uncertain must yield to that which is certain and fixed.—6 Mass., *Pearnan vs. Wead*.

As this cause will be remanded, it is necessary to express an opinion as to the admissibility of that part of *McAafferty's* deposition which was excluded by the court. We do not see any objection to the evidence. It was pertinent, and served to establish the locality of the corner in dispute, and we are unable to see the ground on which it was excluded.

The other judges concurring, the judgment is reversed, and the cause remanded.

Smith vs. Harley et al.

SMITH vs. HARLEY ET AL.

Although the assignee of a note not negotiable cannot sue a remote assignee at law, yet he may in equity. A court of equity will give a remedy by making him immediately liable who is ultimately liable, on the principle that the court entertains jurisdiction to avoid multiplicity of suits, and in such case the original assignor may make the same defence against the remote that he could make against his immediate assignee.

APPEAL from Cooper Circuit Court.

HAYDEN, for Appellant.

1. The note mentioned in the bill is not a negotiable note within our statute defining what notes are negotiable, and therefore, the complainant could not sue Harley at law, he being a remote endorser, but he may maintain his suit in equity against him for the debt.—See 2 Story's Equity, and authorities there; 5 Cranch, 322; 7 *Ibid.*, 69, 97; 1 Brockenborough Circuit Court Rep., 126; 2 Condensed United States Rep., 268, Riddle & Co. vs. Mandeville & Jamison.

CLINTON and RICHARDSON, for Appellees.

1. The note upon which the bill is founded is not negotiable, as defined by the sixth section of the act of the General Assembly, entitled "Bonds and Notes," approved February 4th, 1835, and is not therefore *mercantile paper*, or upon the footing of inland bills of exchange, according to said statute.—See 1 Pirtle's Digest, 354; 2 J. J. Marshall's Rep., 135, Rich, &c. vs. Catterson; 4 Johns. Chan. Rep., 687, McDurmatt et al. vs. Strong; 4 *Ibid.*, 681, (top page) A. Williams vs. Brown et al.; 2 *Ibid.*, 283; 4 *Ibid.*, 671.

2. The plaintiff's bill is bad, because a most material allegation in the same is stated *in the alternative*; viz.: that one of the defendants, Murphy, is *insolvent*, or *if not insolvent*, so involved in debt that it would be useless to sue him.—Story's Equity Pleading, 208, 209, 210, 392; Cresset vs. Multon, 1 Ves., jun., 449.

The case referred to by the appellant, in Peters' Reports, is not in point, because the instrument upon which that suit was founded was upon the footing of an inland bill of exchange, according to the Virginia law.

SCOTT, Judge, delivered the opinion of the Court.

This was a bill in chancery brought by Smith against Harley and others. On a demurrer, there was a decree entered dismissing the bill. The bill alleges, that David and William Workman executed their promissory note to Harley for \$500; that Harley afterwards assigned the note to Murphy, and Murphy to Smith, the complainant. It is also alleged, that the makers of the note, David and William

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Workman, are insolvent, so that a suit against them would be unavailing, and that Murphy, the assignor of the complainant, is also insolvent, or if not insolvent, very much embarrassed and involved in debt, so much so, as it was believed, that it would be useless and unavailing to bring a suit against him. The demurrer to the bill, it seems, was sustained, because the insolvency of Murphy, the assignor of the note to the complainant, Smith, was not alleged with sufficient certainty.

Our statute gives an action to the assignee of a note against the assignor, upon failure to collect it, using due diligence for that purpose; or upon showing that the maker is a non-resident of the State, or that a suit against him would be unavailing. In the construction of a statute concerning bonds and notes, similar to ours, it is held by the courts of Virginia and the Supreme Court of the United States, that independent of any statute, an action would lie by the assignee of a note against the assignor, in the event of a failure to collect it from the maker after diligently instituting and prosecuting a suit for that purpose; that it was not like the sale of any other chattel; that though the statute might give no action against the assignor, yet it resulted, on common law principles, from the debt which the assignment implies, and the promise which the law raises by the assignor to the assignee, that if the assignee, using due diligence, fails to recover of the maker, he will repay the consideration which he received for the paper. It is, however, maintained, that this implied promise extends only to the immediate assignee, and to give none other than him a right of action against the assignor, so that no assignee could sue a remote assignor, there being no privity of contract between them.—*Mackie vs. Davis*, 2 Wash., 219; *Maudeville vs. Riddle*, 1 Cranch, 290.

Although the assignee could not sue a remote assignor at law, yet it was held he might in equity. A subsequent assignor, in assigning a note, is understood to transfer to his assignee his right of action against his immediate assignor. This right is found on a contract not assignable at law, yet, as it is capable of being transferred in equity, it vests as an equitable interest in the holder of the note. If it is transferable in equity, equity will give a remedy by making him immediately liable who is ultimately so, on the principle, that it entertains jurisdiction to avoid multiplicity of action. The original assignor sustains no injury by this course; he will make the same defence against the remote, that he would against his immediate assignee. Otherwise, if there were ten assignments, each assignee would sue his immediate assignor at law, and so on till the first assignor was reached; the amount of the note would be expended in the pursuit. A court of equity brings all the assignors before it, and in one suit does justice amongst the parties; and the defendant has a right to have all the assignors made parties to the proceedings. In the case of *Riddle vs. Maudeville* and *Jamison*, (5 Cr., 122,) it is said, there is no objection to such a course; no principle is violated. Its analogy to the familiar case of a creditor suing, by a bill in equity, the legatees of an estate, is not remote. If an executor has distributed the estate of his testator, a creditor can only sue the executor at law, and he has a remedy over against the legatees. The creditor cannot sue the legatees at law; yet he has never been confined to his action at law: he may bring both the executor and legatees before a court of equity, and

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obtain at once satisfaction of his demand from the legatees, who are ultimately liable.

Although, in the case above-cited, some stress was laid on the fact that the immediate assignor was insolvent, and therefore the right to relief in equity unquestionable, yet it is evident, from the reasoning of the court, that the insolvency of the immediate assignor is not the ground on which a court of chancery entertains jurisdiction, but its action in such cases is founded on general principles of equity law.

The other judges concurring, the decree below is reversed, and the cause remanded.

RICE vs. THE STATE.

If a person assume to act as a physician, however ignorant of medical science, and prescribe with an honest intention of curing the patient, but through ignorance of the quality of the medicine prescribed, or of the nature of the disease, or both, the patient die in consequence of the treatment, contrary to the expectation of the person prescribing, he is not guilty of murder or manslaughter. But if the party prescribing have so much knowledge of the fatal tendency of the prescription, that it may be reasonably presumed that he administered the medicine from an obstinate, wilful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter at least, though he might not have intended any bodily harm to the patient.

APPEAL from St. Charles Circuit Court.

COULTER, *for Appellant.*

SCOTT, *J., delivered the opinion of the Court.*

Rice was indicted for manslaughter in killing Mary Keithley. The indictment contained four counts. The first charged that Rice, claiming to be a physician, on the 1st of February, 1842, at the county of St. Charles, with force and arms, in and upon the body of Mary Keithley, then and there feloniously, ignorantly, and unskillfully did administer improper medicines, which caused the death of the said Mary Keithley, contrary to the form, &c. The second charged, that Rice, acting as a physician, the body of the said Mary Keithley, feloniously and ignorantly, and with culpable negligence, did steam, the said Mary Keithley then being in a state of pregnancy, in consequence whereof she died. The third count charged, that Rice, feloniously, negligently, and unskillfully, did excessively steam the said Mary Keithley, insomuch as to cause her death: and the fourth charged, that Rice feloniously, ignorantly, and in an unskillful manner, did treat the said Mary

Keithley, in consequence whereof she died. At the July term, 1843, of the St. Charles Circuit Court, Rice was tried under this indictment, and was found guilty, and fined two hundred and fifty dollars, and sentenced to thirty days' imprisonment.

On the trial, it appeared in evidence, that the defendant, Rice, was employed by Samuel Keithley, the husband of the deceased, to cure her of the "*sciatica*," with which she had been afflicted for some time. Rice was recommended by an acquaintance of Mrs. Keithley as a botanic physician. He represented to Keithley that he was a regular graduate in the ordinary way, and had practised six years, and that he could cure his wife. Keithley had consulted other physicians in relation to his wife's disease, and had learned from them that they could give only temporary relief. On the 16th January, 1842, Rice went to Keithley's house for the purpose of administering to his wife. He was informed of her situation, she being then about six weeks from the time of gestation, and was told that other physicians had cautioned him against the danger of vapor baths and emetics to his wife, in her condition at that time.

Rice affirmed, that he could use his remedies with perfect safety, and that he had practised on a woman in a condition like that of his wife. Keithley then told Rice, that as he had represented that he was a physician who had regularly graduated, and had practised for six years, although he was prejudiced against the botanic system of medicine, he would entrust the cure of his wife to him. Rice immediately commenced his labors, by steaming and giving lobelia, which caused instantaneous vomiting. The morning afterwards Mrs. Keithley arose from her bed, but soon returned to it, and never afterwards went out. The second day she was much worse, and on that or the day following Rice was sent for, who administered the same prescription as before, which produced similar effects. About a week after, Rice came again, and gave Mrs. Keithley, who was complaining very much, more medicine, believed to be lobelia. On taking leave of her, Rice shook her hand, and assured her she would now be better, and enjoy more health than she ever did. No sooner had Rice left her than she had a premature birth. She was delivered by a German reputed to be a regular accoucheur. The umbilical cord having been broken, the placenta was retained, in consequence of which another physician was sent for, who relieved her of it in the course of eighteen hours. In a few days after, she died. Mrs. Keithley had been married five years, and during that time had three children, always doing well after a birth, and was in better health when Rice commenced his practice on her than she had been for many years. Keithley, the husband of the deceased, testified, that he believed Rice's intentions were good, and that it was his wish to cure her.

Several physicians were examined as witnesses, who expressed different opinions as to the effect of emetics and vapor baths on women in a state of pregnancy. Witnesses were also introduced who testified to the success that had attended Rice's mode of practice; and some of them deposed that their wives, when pregnant, had been steamed by Rice, and taken lobelia, without any injurious effects.

Amongst others, the court was asked to give the following instruction, which

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was refused, viz.:—"That if the jury believe, from the evidence, that Rice, in his treatment of Mrs. Keithley, acted with good and honest intentions, they will find him not guilty."

Motions for a new trial, and in arrest of judgment, were made, and overruled by the court.

We are at some loss to ascertain the offence with which the defendant is intended to be charged. The indictment concludes against the form of the statute, and, we presume, is founded on some statutory provision. The sentence of the court shows that it was not regarded as a common law offence, for the fine is greater than that which can be imposed for an offence at common law. If it was designed as an indictment for manslaughter under the twentieth section of the second article of the act concerning crimes and their punishments, we cannot see on what ground it can be sustained: it has scarcely any of the requisites of an indictment for manslaughter, and so defective is it, that we are left to conjecture that it was intended to charge that offence. It will only be necessary to compare the form of an indictment for manslaughter with this indictment, to be satisfied of its gross departure from all rule. The only difference between a common law indictment for murder and manslaughter is, that the one contains the words, "malice aforethought," and the other does not.—2 Chitty's Crim. Law, 747.

The twentieth section of the second article of the act concerning crimes declares, "that every other killing of a human being, by the act, procurement, or culpable negligence of another, which would be manslaughter at the common law, and which is not excusable or justifiable, or is not declared in this article to be manslaughter in some other degree, shall be deemed manslaughter in the fourth degree."

In order to bring offence within this provision, it must appear that it was manslaughter at common law. Manslaughter is defined to be the unlawful killing of another without malice either express or implied, which may be either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act.—4 Black., 191.

Then, to make the defendant guilty, it must be made appear that it was unlawful for him to administer physic to the deceased with his consent. We are not aware of the existence of a law which prohibits any man from prescribing for a sick person with his consent, if he honestly intended to cure him by his prescription, however ignorant he may be of medical science.

If a person assume to act as a physician, however ignorant of medical science, and prescribe with an honest intention of curing the patient, but through ignorance of the quality of the medicine prescribed, or of the nature of the disease, or both, the patient die in consequence of the treatment, contrary to the expectation of the person prescribing, he is not guilty of murder or manslaughter; but if the party prescribing have so much knowledge of the fatal tendency of the prescription, that it may reasonably be presumed that he administered the medicine from an obstinate wilful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter, at least, though he might not have intended any bodily harm to the patient.

It is not lawful for a man to administer a medicine, of the dangerous effects of which he has had fatal experience.—Commonwealth vs. Thompson, 6 Mass. Rep., 134.

Lord Coke, in his fourth institute, 251, says—"If one that is of the mystery of a physician take upon him the cure of a man, and giveth him such physic as he dieth thereof, without any felonious intent, and against his will, it is no homicide." But he continues—"Briton saith, that if one that is not of the mystery of a physician undertakes the cure of a man, and he dieth of the potion or medicine, that is covert felony." But the soundness of this distinction between licensed and unlicensed physicians has been denied by very high authority, upon the ground that physic and salves were in use before licensed physicians and surgeons existed. (1 Hale, 423.) Blackstone coincides in opinion with Hale, and rejects the distinction between licensed and unlicensed physicians, and maintains the doctrine that if a physician or surgeon gives his patient a potion or plaster to cure him, which, contrary to his expectation, kills him, this is neither murder nor manslaughter, but misadventure. The distinction between licensed and unlicensed physicians can have no existence in this State, as there are no licensed physicians or surgeons.

Although a physician cannot be indicted for murder or manslaughter, if a patient die under his prescriptions when his intentions were honest, yet it has been held that *mala praxis* is a great misdemeanor, and an offence at common law, whether it be for curiosity or experiment, or by neglect.—Dr. Grovenvelt's case, 1 Lord Ray, 214; 3 Black., 122; 2 Russell on Crimes, 288. So, in the civil law, *imperia medici culpa annumeratur*, lib. 4, tom. 3, sec. 7.

The form of the indictment may be found in 3 Chitty's Cr. L., 631, from which it may be gathered what constitutes the ingredients of that offence. The form there given, which is only an example, is substantially, that a midwife intending to deceive and impose upon others, under pretence that she was well skilled in the art of midwifery, caused herself to be employed as midwife, and did so unlawfully, wickedly, ignorantly, rashly, injuriously, unskillfully, improperly, and contrary to good practice in her art, deliver a pregnant woman, that she died. This may seem contrary to what has been before said, relative to the legality of one prescribing for another with his own consent; but however this may be, the law seems to be well settled, as it has been above stated.

There is no pretence that the defendant, Rice, acted from any other than honest motives. The chief witness against him, and he from whom we would most naturally look for the imputation of impure motives, if any existed, expressly declared, that he believed Rice's intentions were good, and that he wished to cure his wife. Nor is there any evidence that the defendant had any knowledge or information of the fatal tendency of his prescriptions: so far from any thing of this kind, the evidence leaves it doubtful whether his practice was unskillful or not. It seems he was a practitioner under the botanic system, and exercised his profession with as much skill and success, if not more, than most who had adopted it. The instruction, then, should have been given, and the motion in arrest sustained. The other judges concurring, the judgment of the court below is reversed.

JACOBS vs. McDONALD.

1. Where the assignee of a note not negotiable sues the maker before a justice of the peace, and the execution is returned by the constable unsatisfied for want of personal property, and a transcript of the judgment is filed in the office of the clerk of the Circuit Court, but no execution is issued thereon by the clerk, the assignee will not be considered as having used that "due diligence in the institution and prosecution of a suit" against the maker that will enable him to maintain an action against the assignee for the amount due. An execution should have issued from the clerk's office, otherwise it would not appear but that the money could have been made out of the real estate of the maker.— See act of February 4, 1835, concerning "Bonds and Notes," R. S. 1835, p. 105.
2. Where an instruction is given with reference to the provisions of a particular statute, it is better that the instruction contain the language of the statute, as where the statute uses the words "due diligence." (See act concerning "Bonds and Notes," R. S. 1835, p. 105.) It is improper to substitute for them the words "reasonable time."
3. It is not every species of neglect, or failure to perform his duty, on the part of an officer, which will deprive an assignee of a note not negotiable of his recourse against the assignor. The misconduct of the officer must be such as will clearly give a recourse against him for the debt. Therefore the defendant, the assignor of the note sued on, offered to prove that the maker had an interest in certain personal property sufficient to pay the debt, but that the constable failed to levy upon and sell the property. It was held that such facts alone did not affect the rights of the assignee, and therefore the evidence was properly excluded.
4. Where a note is assigned, the assignee takes the place of the assignor, and he is required to use that diligence that a prudent man would use to collect the debt had it been his own. He is required to act as a prudent man would act who had no recourse against another in the event of his losing the debt.

APPEAL from Ray Circuit Court.

BOWMAN and DUNN, for Appellant.

1. The return of the officer, of "No property found," in an execution in favor of the assignee, against the maker of the note, is, in an action against the assignor, only *prima facie* evidence in favor of the plaintiff.

2. The proof of the price which the property brought when it was sold raises no presumption of what it would have been sold for at a period of time long anterior.

3. The evidence offered by the defendant, and rejected by the court, that, while the constable had the execution in his hands, the maker of the note had property sufficient, in the same township, to make the debt, ought, in this action, by the assignee against the assignor, to have been received.

4. The facts, if established, would, by disproving both the insolvency of the maker of the note, and the due diligence required of the assignee, have constituted a complete bar to the action.

5. No injustice would have been done to the plaintiff, who ought to have sought his remedy against the constable.

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6. The instruction given, on motion of the plaintiff, by substituting "*reasonable time*" for "*due diligence*", misconstrued the statute, and ought to have been refused.

7. The first instruction asked by the defendant, and refused by the court, being in the language of the statute, and predicated on the facts of the case, ought to have been given.

8. The second instruction asked by the defendant, and refused by the court, rightly assumes, that an unexplained delay of five months, by the constable, was not due diligence.

P. L. EDWARDS, for *Appellee*.

1. The court did not err, either in giving the instructions prayed by the plaintiff, or in refusing those prayed by the defendant.

1st. That asked by the plaintiff was law.

2d. The first and second prayed by defendant, are but abstract principles of law.

3d. The third is against law, and would have taken the case wholly from the jury.

2. The court rightly refused the evidence offered by the appellant.

1st. The property in question may have been concealed by a fraudulent collusion of the appellant, the witness, and the defendant in the execution. It may have been held out to the world as the property of the witness. The appellant did not offer to prove that the appellee had any knowledge or notice, either from himself or others, of the maker's interest in the property in question.

2d. The constable's return on the execution, of "No property, &c.," is conclusive that the defendant had none in the township.—*Hogan vs. Vance*, 2 Bibb, 34.

3. The courts of Kentucky have exacted, of assignees of notes not negotiable, extraordinary diligence. In Virginia, a very different construction has been given to a statute of the same character. The rules established by the former carry the doctrine of diligence to an extent unknown to the common law, and unauthorized by general principles. The true rule, the one sanctioned by the Supreme Court of the United States, is, that the assignee is bound to such diligence as a man of ordinary diligence and prudence would employ in a case in which he was solely and exclusively interested.—*Bank of the United States vs. Tyler*, 4 Peters' Rep., 366.

4. The record shows, that in this case the assignee used not only due diligence, but extraordinary diligence.

1st. Almost immediately after the assignment, he instituted suit, and obtained a judgment at the first rule-day.

2d. On the third day thereafter he takes out execution, which is returned, "No property, &c."

3d. He then takes a transcript to the Circuit Court.

4th. He then caused the execution to be renewed, and a supposed debtor of the

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defendant therein to be garnisheed, and the execution is again returned, "No property," &c.

5. There is no irregularity disclosed by the record, of which the appellant can now take advantage.

6. Could the appellee be required to know that the maker of the note had property which the constable could not find? Can the appellant be allowed to prove that the property which was sold under the execution would have brought more if the sale had been made at an earlier day?—and would such matter be any defence?—See the doctrine of assignment of notes not negotiable, examined in *Harmon vs. Armstrong*, 5 Mo. Rep., 274; *Pococke vs. Blount*, 6 *Ibid.*, 338; *Bank United States vs. Weisiger*, 2 Peters' Rep., 331; *Same vs. Tyler*, 4 Peters' Rep., 366, and authorities referred to.

SCOTT, J., *delivered the opinion of the Court.*

This was an action of assumpsit, commenced by McDonald, the assignee, against Jacobs, the assignor of a promissory note executed to him by Thomas A. Jacobs, in which McDonald recovered a judgment. The suit was instituted in a justice's court, and taken to the Circuit Court.

On the trial in the Circuit Court, the note assigned was given in evidence, on which there was the assignment to McDonald, dated the 29th January, 1842. A summons was issued against the maker, T. A. Jacobs, on the 17th of February, 1842, returnable to the 5th March following, on which day judgment by default was taken against Jacobs. An execution was issued on the 8th of March, and returned the 7th May, "No property found." A transcript was filed in the office of the clerk of the Circuit Court on the 2d July, and on the 23d July the execution was renewed for sixty days. By virtue of this execution, on the 6th day of August, Jacobs' interest in a stallion, being one-half, was sold, which brought the sum of twenty dollars, and the constable returned, that he could find no other property on which to levy the remainder of the debt. Henry Jacobs, the defendant, then offered to prove that Thomas A. Jacobs had an interest in the stallion, and resided in the township in which suit was brought, during the winter of 1842, and until some time in April following, and that the horse was in the same township; that the horse was worth a great deal more than he sold for, and would have paid the debt had he been offered for sale at an earlier day. This evidence was not admitted by the court, to which an exception was saved.

The court instructed the jury, at the instance of the plaintiff, McDonald, that if they find, from the evidence, that the note was assigned by the defendant to the plaintiff, and prosecuted with effect in a reasonable time, and that the returns on the execution show that the debt could not be made from T. A. Jacobs, then, in the absence of any other proof, they must find for the plaintiff.

In our opinion, the plaintiff had not shown a right to recover, inasmuch as no execution had issued from the clerk's office of the Circuit Court, on the transcript of the justice. A constable cannot sell lands under an execution. From aught that appears, Thomas Jacobs may have had land. Why was a transcript filed, if

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there were no land on which the lien of a judgment could attach? No *capias* can now issue against the defendant in debt, consequently, there is no mode of compelling a party to surrender lands in discharge of an execution issued from a justice's court. An execution from the Circuit Court can alone reach them, and it should have been issued, otherwise it does not appear but that the money could have been made out of the real estate of Thomas A. Jacobs.—*Bank of United States vs. Tyler*, 4 Peters' Rep.

As the judgment will be reversed, we cannot refrain from an expression of the opinion, that the instruction did not contain the language employed by the statute, and we can see no reason for substituting the words, "*reasonable time*," for "*due diligence*," the words used by the act. And this appears the harsher, as instructions, couched in the language of the law, were asked by the defendant, and refused. If the steps taken in the cause had shown due diligence in the institution and prosecution of a suit, we would not have reversed the judgment for this reason.

As to the evidence which was excluded by the court, we are not prepared to say the court committed error in so doing. The object of the evidence was not to show, as it seems, a want of diligence in the plaintiff, but neglect in the officer. It is not every species of neglect, or failure to do his duty, which will deprive the assignee of his recourse against his assignor. It seems, the misconduct of the officer must be such as will clearly give a recourse against him for the debt, (3 Mon., *Postlewait vs. Garrett*,) otherwise the assignee will not be deprived of his recourse against the assignor. It would be very hard if a person, obliged to bring a suit, should suffer by the neglect or misconduct of those employed by the law to perform acts which can be done by them alone.

When a note is assigned, the assignee takes the place of the assignor, and he is required to use that diligence that a prudent man would use to collect the debt had it been his own; and he will not be permitted to let the knowledge of the fact that he has a recourse against the assignor relax his exertion to obtain payment. He is required to act precisely as a prudent man would act, who had no recourse against another in the event of losing his debt. What his conduct should be, must be determined from the circumstances of each case. It is the duty of the assignee to institute a suit against the maker, as promptly as he may prosecute it with due diligence. When the maker or obligor is in doubtful circumstances, but not insolvent, it is the duty of the assignee to proceed with the utmost promptitude, and to prosecute his suit with diligence to judgment, and sue out execution without any unreasonable delay.

The other judges concurring, the judgment below is reversed, and the cause remanded.

Davis vs. Christy.

DAVIS vs. CHRISTY.

1. A. executed his bond to B., who assigned it to C. Some time afterwards C. brought the bond to B. with his assignment thereon erased, and B. thereupon, at the request of C., assigned the bond to E.: *Held*, That the erasure of the assignment did not divest C. of the legal title to the bond, and consequently that E. could not sue in his own name as the legal owner thereof.
2. It is well-settled, that the holder of a promissory note, whether negotiable or not, may strike out blank endorsements; such, however, does not seem to be the law with regard to endorsements in full, which confer a legal title to the instrument.

APPEAL to Johnson Circuit Court.

YOUNG and HICKMAN, for Appellant.

Foster, the payee of the bond, by the assignment to Holden, divested himself of the legal title to the bond, and the title thereof was, by said assignment, vested in Holden, the first assignee; and as Foster, at the time he made the assignment to Christy, was not the legal owner of the bond, and had no interest therein, he could not, by the assignment, transfer any title or interest to the plaintiff, Christy, and consequently Christy could not maintain an action thereon. (See Rev. Statute of 1835, p. 105, sec. 2; *Jeffers vs. Oliver*, 5 Mo. Rep., p. 433.) Christy obtained no greater title to, or interest in, the bond, by the assignment of Foster to him, than Foster had at the time of the assignment. The bond sued on was not negotiable, but merely assignable, by our statute.—*Beatty vs. Anderson*, 5 Mo. Rep., 447.

In an action on a bond or note by the payee or obligee, a plea alleging that the bond or note had been assigned to a third person before suit brought, is a good bar to the action.—*Thomas, use of Deane, vs. Wash*, 1 Mo. Rep., 666.

To transfer the legal title to a bond or note not negotiable, so as to enable the assignee to maintain an action thereon in his own name, there must be an assignment in writing. At common law, bonds of the description of the one sued upon could not be assigned, so as to enable the assignee to maintain an action thereon in his own name, and it is by our statute law alone, that the assignment of bonds or notes transfer the legal title in the assignee, and the assignment to transfer the legal title must be in writing, as this Court has frequently decided. Now, the only way the legal title of the bond could be re-vested in Foster was, by the re-assignment in writing of Holden, the legal owner of the bond. Erasing the assignment to Holden did not re-vest the title in Foster, but to do so it was necessary that there should be an actual re-assignment from Holden to Foster. (*Able and Isbell vs. Shields*, 7 Missouri Reports, 120.) Davis, the obligor, would have had a right to plead any just off-set he might have had against Holden in a suit on the bond by him, or any just off-set he (Davis) might have had against Holden to the bond in the hands of his assignee at the time of the assignment. (See concerning bonds and notes, Rev. Statute of 1835, p. 105, sec. 4.) Yet if, by erasing the

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assignment to Holden, the title re-vested in Foster, the payee, and he or his assignee is permitted to maintain an action thereon, Davis would thereby be deprived of availing himself of his off-set against Holden; this would open a wide door for fraud. The facts of this case show, that it was not the intention of Holden, the first assignee, by erasing the assignment, to re-vest the title in Foster, the payee, but as a more convenient mode of transferring the title to Christy, or perhaps of avoiding a just off-set that Davis had against Holden. Foster, when he made the assignment to Christy, seemed to be aware that he had no title to the bond, for the assignment is without recourse. For these reasons we contend, that the judgment of the Circuit Court should be reversed.—*Bradford vs. Ross*, 3 Bibb, 238; *Long vs. Bank Cynthiana*, 1 Littell, 291; *Wiggins vs. Rector*, 1 Mo. Rep., 338; *Bates vs. Martin*, 3 Mo. Rep., 259.

LEONARD and BAY, for Appellee.

1. There was no sufficient evidence of any assignment of the bond by Foster, the obligee, to Holden.

2. By the cancellation of the assignment, if any such were made, the legal title of Holden was divested, and the same remained in Foster.—*Burdick vs. Green*, 15 Johns. Rep., 248.

SCOTT, J., delivered the opinion of the Court.

Christy, as assignee of James M. Foster, sued Davis in a justice's court, on a bond executed by Davis to Foster, for the sum of \$82. The cause was taken to the Circuit Court, where Christy recovered judgment, from which Davis appealed.

On the trial in the Circuit Court, Davis, to defeat Christy's right of recovery, objected to the reading of the bond, and the assignment thereon, as evidence; and in support of this objection proved, that James M. Foster, the obligee of the bond, assigned it for a valuable consideration to N. B. Holden, by a writing endorsed on the bond, and signed by Foster; that some six months thereafter, Holden brought the bond to Foster with the assignment cancelled, and requested him to assign the bond to Christy, which Foster accordingly did, making it without recourse against himself. The court overruled the objection, and a verdict and judgment were entered for Christy.

The question is, whether Christy had a right to recover under this state of facts? It seems well-settled, that the statute concerning bonds and notes makes the assignee the legal owner of the instrument assigned, and consequently, that it is erroneous to institute a suit in the name of the obligee or payee after an assignment. (*Jeffers vs. Oliver*, 5 Mo. Rep., 434.) That statute also gives the maker of a note, or obligor of a bond, a right of set-off against the assignee. It is not pretended that Foster, in making the assignment to Christy, acted as the agent of Holden; if he did, he failed to execute his power in such a manner as to bind or affect Holden. It is said the cancellation of the assignment by Holden re-vested the legal ownership of the bond in Foster. We cannot see on what principle such

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a consequence follows from the cancellation of the assignment. It does not appear that the cancellation was made with any such motive, for it was done without the knowledge or consent of Foster, but with a view to destroy the evidence of the fact that Holden had been the legal owner. The law will not permit a cancellation to be made when the interests of the obligee may be affected by it. If the obligee's right of set-off would exist against the assignee, notwithstanding the cancellation of the assignment, yet the proof of the facts necessary to entitle him to it is rendered more difficult. The case of *Drummond vs. Fletcher* (2 Wash.) is not like the present. No evidence of the cancellation of the assignment was given by the party, and the question was one of variance between the proof and declaration. The objection was, that a cancellation was made, without proving the fact. The circumstances attending this transaction are suspicious. Holden takes the bond and retains it for some six months, and then, instead of assigning it immediately to Christy, as he might have done, he cancels the assignment made to himself, not with the assent of Foster, or with a view to give him any interest in the bond, but, as it would seem, to obliterate the evidence of the fact that he had ever been the owner of it. He uses Foster simply as an instrument, who, showing the capacity in which he acted, assigned it to Christy without recourse. Nothing is better settled than that the holder of a promissory note, whether it be negotiable or not, may strike out blank endorsements; such, however, does not seem to be the law with regard to endorsements in full, which confer a legal title to the instrument. The law on this subject does not seem to be well settled; at least there is great conflict of authority, whether the mere possession of a promissory note by an endorser who has endorsed it to another while the assignment remained, is sufficient evidence of his right of action against his endorser, without a re-assignment or receipt from the last endorser.—*Mendez vs. Carreroon*, 1 Lord Ray, 742; *Gorgeat vs. McCarty*, 2 Dal.; *Bank of Utica vs. Smith*, 18 Johns.; *Welch vs. Lindo*, 7 Cranch, 159; *Dugan vs. United States*, 3 Wheat., 172; *Nevins vs. Degrand*, 15 Mass. Rep., 436.

However the law may be on this subject, in cases unaffected by any statutory provisions, we think that, under our statute, the course pursued by the assignee, Holden, cannot be sustained. We do not feel ourselves called upon to express an opinion as to the mode to be adopted to recover the debt, if any recovery can be had.

Whether a suit can be brought, and the form of it, must be determined entirely by the circumstances, which do not appear on the record.

The other judges concurring, the judgment of the court below is reversed.

Hembree vs. Campbell.

HEMBREE *vs.* CAMPBELL.

Where the plaintiff and defendant reside in different counties, and the suit is brought in the county in which the plaintiff resides, and the summons is served upon the defendant in the county in which he resides, and he appears and pleads to the action, the illegality of the service is waived by such appearance and pleading. The court having jurisdiction over the subject-matter, but not over the person of the defendant, he should, to have availed himself of the illegality of the service, have filed his plea in abatement: by pleading to the merits, he acknowledged that the court had jurisdiction of his person.—TOMPKINS, Judge, dissenting.

ERROR to Dade Circuit Court.

PHELPS, for Plaintiff in Error.

Appearance and pleading to the merits cured any defect in the service of the writ. (*Whiting et al. vs. Budd*, 5 Mo. Rep., 543; *Barnet and Ivers vs. Lynch*, 3 Mo. Rep., 261, 2d edit.) Want of service cured by appearance and defence.—*Griffin and Kinote vs. Samuel*, 6 Mo. Rep., 50.

That defendant cannot take advantage of any error or defect in the process after he has appeared to it.—1 Tidd's Practice, 91, 434.

WINSTON, for Defendant in Error.

1. The court had no right to issue either of the subsequent writs, until there had been a return of the first writ.

2. The writ which was served upon the defendant was directed to the sheriff of the wrong county, and therefore a mere nullity, and that the appearance of the said defendant did not preclude him from afterwards taking advantage of a void writ.—5 Mo. Rep., 227.

3. The plaintiff did not move the court below to set aside the judgment rendered in this cause, as he ought to have done.

4. The judgment of the court below, sustaining the motion to quash the writ, is not such a final judgment from which an appeal or writ of error will lie to this Court.

SCOTT, J., delivered the opinion of the Court.

Hembree brought an action of trover against Campbell, in the Circuit Court of Dade county. Two writs, or summons, were issued by the clerk of said court, directed to the sheriff of Dade county, the last of which was returned, "*non est inventus*." A writ was thereupon directed to the sheriff of Polk county, which was served on the defendant, and returned. At the return term, Campbell appeared, and plead not guilty; and afterwards, during the same term, moved the court to

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quash the writ, because it was improperly directed, which motion was sustained, and the suit dismissed.

The question is, whether the motion was properly sustained by the court below? The statute regulating practice at law directs, that a suit instituted by summons or *capias* shall be brought, when the defendant is a resident of the State, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found. It was clearly illegal for a plaintiff residing in Dade county to bring suit against a party residing in another county. But the Circuit Court of Dade county is a court of general jurisdiction; it had jurisdiction of the subject-matter of this suit; and if the defendant, being served with its process, appeared and plead to the merits of the action, thereby acknowledging its jurisdiction of his person, he would not be allowed afterwards to object to the regularity of the proceedings. When a defendant is sued in a wrong county, it is clear, under the act above-mentioned, he can, by pursuing the regular steps, defeat the plaintiff. But exceptions of this kind do not affect the merits of a controversy; they do not show that the plaintiff has no right to recover, and are no bar to the action. They then must be matter of abatement, and if such, a party who would avail himself of them must do it in time. He must do no act to acknowledge the jurisdiction of the court over his person, otherwise he will be precluded from afterwards availing himself of them. Had steps for quashing the writ been taken at a proper time, no doubt it should have been done; but after the defendant appeared and plead the general issue, it was too late to avail himself of any matter in abatement. No principle of pleading is better established, than that a plea in bar is a waiver of all dilatory matter of defence. That the matter of abatement was apparent upon the writ can make no difference. Such matters are and should be pleaded. (2 San., 209, *n.* 1.) Suppose the plaintiff had violated the above-mentioned provision of the statute, in a manner so as not to be apparent upon the writ; suppose the defendant had been sued in a county in which neither he nor the plaintiff resided—he would then have been driven to his plea of abatement, in order to show the facts, and if a plea of abatement is necessary when the provision is violated in one respect, why not when it is violated in other respects? The fact that the matter of abatement is apparent on the face of the writ can make no difference. If a party would avail himself of it, he must do it in time, and by substituting a motion (an irregular practice) for a plea in abatement, he will not be permitted to gain an advantage denied to him by a regular course of proceedings.—*Wellborn vs. Tindall*, 1 Mo. Rep., 150; *Bettis vs. Logan*, 2 Mo. Rep., 4.

Judge NAPTON concurring in this opinion, the judgment of the court below is reversed, and the cause remanded.

TOMPKINS, Judge, dissents.

Byrd vs. Fox.

BYRD vs. FOX.

1. An action may be maintained for breach of a promise to admit the plaintiff as a partner in a particular undertaking, where the plaintiff and defendant agreed to become partners in such undertaking, and to share the profits and losses.
2. Where, in a settlement between partners, there is but one item, and that adjusted by an express promise to pay the amount, assumpsit may be maintained thereupon, by one partner against the other: and so, even, where the item is unadjusted.

APPEAL from Platte Circuit Court.

JONES and HICKMAN, for Appellant.

1. Any promise or agreement made to pay Fox the one-half he got for the contract is void for want of consideration.—See 1 New York Digest, 39; 6 Johns. Rep., 194; 8 *Ibid.*, 444.
2. If any promise was made by Byrd to pay one-half he got for the contract, it was conditional (*viz.*) “To pay when he got some money,” and until he (Fox) shows that he (Byrd) has had money subsequent to the promise, he is not entitled by law to recover.—See 1 New York Digest, 38; 14 Johns. Rep., 178; 1 Cow., 349; 7 Johns. Rep., 36.
3. There was no partnership existing between appellant and appellee.—See 3 Kent’s Com., 23, 24; 1 Hammond’s Ohio Rep.; Ohio Condensed Rep., 41.
4. If the appellant and appellee were partners, then the appellee was not entitled to recover in the court below, because the partnership matters between them had not, from the evidence, been finally adjusted.—See Collyear on Part., 143, note 1; 5 Mo. Rep., 112.

THOMAS and BALDWIN, for Appellee.

1. The Circuit Court did right in giving the plaintiff’s instructions, and in refusing the first, third, and fourth asked by the defendant.

The only question which we conceive to arise in this case is, whether there was a sufficient consideration to support the promise of Byrd, the appellant.

The law is well settled, that the promise of one party is a good consideration for the promise of the other.—*Vide* Chitty on Contracts, 4th edit., p. 40, and notes; 9 B. and C., 840, 849, 850; 3 B. and A., 703; 8 Johns. Reports, 304, *Briggs vs. Tillotson*.

“The mere promise of a party to become a partner in a firm is a sufficient consideration for a promise to receive him as a partner.” (*Chitty on Cont.*, 40, 15.) A benefit to one party, or loss or injury to the other, is a good consideration on which to found a promise.

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2. The partnership matters were adjusted, and a promise by the appellant to pay the appellee his share of the profits.

If there had not been a final adjustment, the jury had a right to find according to the equity of the case.—See Rev. Code, 348, sec. 1.

SCOTT, J., delivered the opinion of the Court.

Fox sued Byrd in a justice's court, where, after judgment, the cause was taken to the Circuit Court, when, upon a trial *de novo*, he recovered judgment for \$37, from which Byrd appealed to this Court.

It was agreed between Byrd and Fox, that Byrd should go to Fort Leavenworth, and put in a bid in their joint names, to furnish the garrison with fifteen hundred cords of wood, and that they should be equal partners in the contract; that Byrd might bid as he thought most advisable, and Fox would be responsible jointly with him for his acts. Byrd made a bid for the contract, and his bid was the same with those of two others: it was then agreed among the several bidders, that Byrd and one of them should together have one-half of the contract, and the other bidder the remaining half. Byrd sold his interest in the contract for seventy-five dollars, and afterwards told Fox that he had made a good bargain, and would pay him his half of the profits as soon as he could get some money; that he considered, if any loss had happened, Fox would have borne his share of it.

The only questions arising upon this statement of facts are, whether there was a sufficient consideration for the promise of Byrd, and whether, being partners, if one could sue the other in an action *ex contractu*.

As to the first point, it has been held, that damages may be recovered on an agreement by a partner to admit a stranger into the firm, and that the undertaking of the stranger to become a partner is a sufficient consideration for such an agreement. (23 Eng. Com. Law Reports; 9 Bing., *McNeil vs. Reid*.) So, it has been held, that an action may be supported by one person against another for breach of a promise to become a partner.—*Figes vs. Cutler*, 3 Starkie's Rep.

As to the second point, the law seems to be settled, that if there are partnership dealings, and one item only remains unadjusted, the difficulty as to one partner maintaining assumpsit disappears. (*Robson vs. Curtis*, 1 Stark. Rep., 78; *Musier vs. Trombone*, 5 Wend., 274.) In this case there was but one item, and that one item adjusted by an express promise to pay.

Judge NAPTON concurring, the judgment is affirmed.

Judge TOMPKINS dissents.

Bruten vs. Lynch.

BRUTEN, SENIOR, vs. LYNCH.

APPEAL from Platte Circuit Court.

S. L. LEONARD, for Appellant.

1. At the last trial in the Circuit Court, the plaintiff was permitted to change his cause of action, and in this there was error.—See Rev. Stat., title, "Justices' Courts," sec. 16, p. 371.

2. The Court erred in excluding proof that D. Bruten, senior, was a pre-emptor, for surely one is not liable in trespass for removing rails cumbering his own land, especially when knowingly placed there against his will.

3. The Court erred in excluding proof that A. Bruten and plaintiff were joint pre-emptors on that quarter where the rails were made, and consequently tenants in common in the timber; for the cutting of the timber by plaintiff, without the consent of A. Bruten, does not divest his property therein.

4. The plaintiff failed entirely to prove the place charged; failed to prove the quarter fractional, and failed to prove it in his possession.

5. The plaintiffs failed to offer any proof whatsoever against A. Bruten.

SCOTT, J., delivered the opinion of the Court.

Lynch sued Bruten and others in a justice's court, for damages caused by throwing down a fence and removing rails; after judgment, the cause was taken to the Circuit Court, where, on a trial *de novo*, Lynch again had judgment for \$12, from which this appeal is prosecuted.

It appears that John Lynch, the plaintiff in the court below, made an improvement on a quarter-section of land on which Jahew Lynch lived, with the consent of the said Jahew; afterwards, Jahew sold his improvement to David Bruten, one of the defendants below. Bruten gave notice to Lynch to make no more improvements on the quarter-section, as he expected to have a pre-emption to the same: Lynch hauled rails afterwards on the quarter-section, and laid a portion of them up, and some were left lying on the ground: David Bruten and others hauled them away. The defendants offered to prove that David Bruten was entitled to a pre-emption to the quarter-section on which the rails were laid by Lynch; and that the rails were made from timber on a quarter-section to which one of the defendants and Lynch were entitled to a pre-emption, without the consent of said defendant; and that David Bruten and others assisted that defendant in taking away the rails. This evidence was excluded by the court. On the trial in the Circuit Court, the plaintiff only claimed damages for the loose rails lying on the ground.

It is assigned for error, that the court rejected the evidence offered by the defendants, and that there was no evidence against one of the defendants.

Per Curiam.—Let the judgment be affirmed.

Glasscock vs. Glasscock and Dodd.

GLASSCOCK vs. GLASSCOCK & DODD.

1. An instrument of writing will not be considered as sealed unless by some expression in the body of the instrument; the maker should show that he intended it to be considered as a specialty. A mere scrawl at the end of the name, with the word "Seal" within it, will not make the writing a bond.—See *Cartmill vs. Hopkins*, 2 Mo. Rep., p. 179, 2d edit.; *Boynnton vs. Reynolds*, 3 *Ibid.*, p. 57, 2d edit.; *Grimsley vs. Administrator of Riley*, 5 *Ibid.*, p. 281.
2. The Circuit Court may, in its discretion, permit a mere formal amendment to be made at any time, even during the progress of the trial.

ERROR to Ralls Circuit Court.

WELLS and CAMPELL, for Plaintiff in Error.

The question involved in this case is, "Were the instruments of writing on which the suit was founded notes or bonds." In this case, the writings did not purport to be sealed, either in the body of the paper nor in the testatum, but to each signature was attached the word "Seal," with a scrawl around it. There was no seal made by wax or by any actual impression, and the question presents itself, whether it can be taken as a seal under our statute. The plaintiff assigns for error the decision of the Circuit Court, in deciding that the said instruments of writing were *bonds* and not *notes*, and in excluding them from being read as evidence in the cause. We contend, on the part of the plaintiff, that this question has been settled by a series of decisions of this Court, as may be seen by reference to the following cases:—*Cartmill vs. Hopkins*, 2 Mo. Rep, 220; (*rep.*, p. 179;) *Boynnton vs. Reynolds*, 3 Mo. Rep., 80; (*rep.*, p. 57;) *Grimsley vs. Administrator of Riley*, 5 Mo. Rep., 281. See, also, 1 Wash. Rep., 270; 1 Mumford's Rep., 490; 4 *Ibid.*, 442.

On motion of the plaintiff, the court permitted to be amended his petition, by inserting the words, "Witness my hand," which had been inadvertently omitted in writing the original petition.

This was a correction of a mere clerical error, which any court would not hesitate to permit, and by which no principle of law was violated, and no injustice done to the defendants. This amendment is fully warranted by our statute of jeofails and amendments, and is in conformity to the liberal and reasonable course of practice that aims at substantial justice to the parties. No argument is needed to prove that this objection on the part of the defendants is untenable.

SCOTT, J., delivered the opinion of the Court.

The plaintiff in error sued the defendants in error, by petition in debt on two notes set out in the petition. The instruments on which the suit was brought were not actually sealed, but to them there were scrawls annexed, and within

these scrawls the word "seal" was written in full. There was no recognition of the scrawl as a seal in the body of the instrument. On the trial, the court below refused to permit the notes to be read in evidence, because they were deemed to be bonds, and therefore varied from the writings set out in the petition, which were described as notes.

The court, during the progress of the trial, permitted the plaintiff to amend his petition in a matter of form; this was objected to; the plaintiff took a non-suit and moved to set it aside, which motion being overruled, he brought his writ of error.

In the case of *Cartmill vs. Hopkins*, 2 Mo. Rep., it was held, that to make a scrawl a seal it was necessary that it should appear that the maker intended it as such, by some expression in the body of the instruments to which it was annexed. This decision has been adhered to ever since, and we are not now prepared to depart from it.

The construction put upon our statute, making a writing, to which there was annexed a scrawl by way of seal, a sealed instrument, was adopted in analogy to the interpretation put upon a similar law of the State of Virginia. Judge Tucker, of that State, in one of the early cases on this subject, placed this construction, on the ground that it was necessary, in order to prevent unsealed instruments from being converted into sealed ones by the bare annexation of a scrawl, which could not be so easily affected if the scrawl was recognized as a seal in the body of the instrument. The word seal being written within the scrawl, does not show that the instrument was intended to be a sealed one. That can only be shown by what appears on the face of the instrument. This case is neither within the letter nor spirit of the former decisions, the law of which seems to have been recognized by the general assembly, at the late revision of a change in the phraseology of the former statute, adopting those decisions.

This Court can see no error in permitting the amendments to be made by the plaintiff, as they were formal, although they were made during the progress of the trial. This would seem to be a matter entirely in the discretion of the court below.

The other judges concurring, the judgment will be reversed, and the cause remanded.

DECISIONS
OF THE
SUPREME COURT OF MISSOURI,
AT
JULY TERM, 1844.

DENT vs. BINGHAM.

Ejectment.—The land in controversy was claimed by the plaintiff, as lessee of the town of Carondelet, being part of a tract claimed by that town as commons. The town claimed the commons by virtue of a concession from Don Zenon Trudeau, lieutenant-governor of Upper Louisiana, dated 7th of December, 1796. A survey of the commons was commenced in 1797, by Soulard, the surveyor-general, but not completed. On the 7th of June, 1808, the inhabitants of Carondelet filed, with the recorder of land titles, a notice of the claim. The board of commissioners, on the 2d of January, 1812, rejected the claim. The recorder of land titles, on the 22d of August, 1834, certified that the claim was confirmed by the 1st section of the act of Congress of June 13, 1812, and the several acts supplementary thereto. A survey of the commons was made in March, 1834, in pursuance of instructions from the surveyor-general's office, dated February 16, 1834. This survey was a continuation of the western line of the commons, as commenced by Soulard in 1797, and embraced 9905 29-100 acres. The original claim of the town was for 6000 arpens only.

Defendant claimed under Gabriel Cerre, and proved notice to the recorder of land-titles on the 28th of November, 1812, and a concession dated 15th of March, 1789. In February, 1833, the board of commissioners recommended this claim, amounting to 6000 arpens, for confirmation, and it was confirmed by the act of 4th July, 1836. The claim of the defendant was embraced within the lines of the commons claimed by the town of Carondelet.

TOMPKINS, Judge, was of opinion that no title in the town of Carondelet was shown to any commons.

SCOTT, Judge, was of opinion that the confirmation of the claim of the town was not by metes and bounds, and only so much land passed as was actually claimed by the inhabitants in the notice filed with the recorder of land titles. They claimed 6000 arpens, and were entitled to that quantity in the direction indicated in their claim; and if that quantity could be obtained without interfering with the rights of others, they could not be disturbed in the enjoyment of their possessions.

As the claim was for a certain quantity of land, and not by metes and bounds, the town was entitled to the quantity claimed, and no more.

NAPRON, Judge, was of opinion, that the claim of the town of Carondelet was for a specific tract of land, designated by metes and bounds, and that the quantity claimed could not be permitted to control where specific boundaries were fixed; that whatever ambiguity there might have been in the decree of the lieutenant-governor, Trudeau, in relation to the western line mentioned in that decree, was removed by the survey made by his authority in 1797, and that

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this survey being before the board of commissioners, and communicated to Congress, was sufficient to apprise Congress of the extent and boundaries of the land claimed, and that the act of Congress of 13th June, 1812, confirmed the claim to the commons to the full extent claimed before the board of commissioners, by virtue of said decree.

Judges TOMPKINS and SCOTT concurred in the reversal of the judgment of the Circuit Court, which was rendered for the plaintiff below—NAPTON, Judge, dissenting.

APPEAL from the St. Louis Court of Common Pleas.

GAMBLE, for Appellants.

The confirmation by act of 13th June, 1812, is a grant by the government, which is not to be construed as the deed of an individual, most strongly against the grantor, but by it nothing passes except what is necessary to effectuate the purpose of the grantor.—11 Peters' Reports, Warren Bridge vs. Charles River Bridge; 6 Peters, Arredondo's case.

The title under that confirmation is not now more extensive than when the act was passed, and embraces no other land than was then granted.

The extent of the confirmation is to be ascertained from the evidence upon which Congress acted.

Congress acted alone upon the *claim* for 6000 arpens, and the petition of Gamache, with the decision thereon by the lieutenant-governor; the survey by Soulard; the second certificate of Soulard, and the testimony of Chouteau and Provonchere.

The effect of the notice of claim is to be ascertained by the law under which it was filed.

All claimants were by law required to specify, in their notices, the *extent of their claims*.—Act of 1805, sec. 4; Land Laws, 123.

The specification of quantity, in a notice filed under this law, is not a part of the description of the land, but is a compliance with a substantial requirement of the law, and is a substantial part of the claim, as acted upon by Congress.

If the claim to quantity be considered as immaterial, then the action of Congress, being irrespective of the quantity, and based only upon the documents before them, would be restricted by the land north of the river Des Peres, because, under the order of the lieutenant-governor, there was a survey of that land as their common, which survey was complete, and is not affected by the subsequent certificate of Soulard; nor does the subsequent certificate of Soulard show in what respect the previous survey was incomplete, or what part of the land or lines remained to be surveyed.

If the claim to quantity should be regarded as immaterial, then what is stated above would be the proper result of the construction of the act of Congress: but the claim to quantity, even in ordinary conveyances, is only controlled by calls for such boundaries, or such precise limits as clearly describe the tract conveyed; and in this case there is no such call, or description of the tract. Again, as the law required the extent or quantity of the claim to be specified,

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that extent or quantity, when expressed, would control, in the construction of the grant founded thereon, unless there were great certainty in the boundaries or limits of the claim; therefore, the quantity or extent of the claim is not immaterial.

If we construe the act of confirmation, in relation to the claim and its extent, as presented to the government, then these results will follow:

1. That the village is to have no more than 6000 arpens.
2. That there has been no lawful survey of the commons, under the confirmation.
3. That, until such survey, the village cannot, nor can its lessees, eject a person from any land, as the position and form of the tract remain to be ascertained by survey. There are many acts of Congress, in relation to the survey of these claims, after they were confirmed.
4. The claim, as confirmed, is not adverse to the claims of other persons, whose lands were reserved by the tenth section of the act of April, 1811, and whose lands are not required to make up the quantity confirmed.

This case is altogether unlike the cases of the Saint Louis and Saint Charles commons, where the claims being for specific quantities by surveys, required, that the claims be held to embrace all within the surveys, in order to make up the quantity. There, the claims to commons were held to be clearly adverse to all other titles, and the confirmations were correctly held to cover every acre of the land within the boundaries. No other construction could be given to the grant by the United States.

The whole point of this case is most easily understood and determined by considering the act of 1812 as a deed from the United States, conveying the land claimed.

SPALDING, *for Appellant.*

1. The court improperly gave the first instruction asked by plaintiff below—

1st: Because that instruction assumes that a line running south, 28 degrees west, is the true western line of the pretended grant of commons by Trudeau; whereas it should have been left to the jury, inasmuch as the pretended concession did not specify the line by giving its course according to the compass, but merely says, "a line taken at the end of the common field of said village, and running parallel to the Mississippi, 150 arpens lower down." See Brown and Milburn's testimony.

2d: Because there was no confirmation by the act of 13th June, 1812, unless there was either a *concession*, or *survey*, or user of the land as commons, under the Spanish government, neither of which existed, as to so much of the land as lies south of the river Des Peres.—6 Mo. Rep., 510, *Bird vs. Montgomery*; 7 Mo. Rep., 7, *Mackay's Heirs vs. Dillon*.

3d: Because the act of June 13th, 1812, must be considered as having operated only where there is no reasonable certainty, and as to the land south of the river Des Peres, the claim, as set up, was altogether uncertain.

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4th: Because, there being nothing certain in the claim as filed, except the quantity of 6000 arpens mentioned in the notice, the land belonging to the village of Carondelet as commons depends entirely on the action of the government, in making its location, and that action has not taken place; a survey has been made and disapproved, and the claim is yet unlocated.—4 Story's Laws U. S., 2408; Act re-organizing Land Offices; 2 Story's Laws U. S., 1792, sec. 2.

5th: Because said instruction withdraws from the jury the consideration, whether the claim to commons was or was not *adverse* to the claim of Cerre. In fact, it instructs them that it was adverse, and that the confirmation of it included the Cerre land.—9 Johns. Rep., 102; 9 Cowen's Rep., 530. These cases show that the question, whether adverse possession or not, is a question for the jury.

2. The second instruction of plaintiff below is wrong in this, that it assumes that the confirmation of the commons was by a fixed and definite boundary, and also, that it takes from the jury the consideration whether the claim and confirmation of commons was adverse to the Cerre claim.

3. The seventh instruction of plaintiff directs the jury to consider the claim for commons as adverse to *inchoate concessions*, within the extent of the claim, which were not expressly, or by necessary implication, excepted.

Under the circumstances, the instruction should have been, that such claim was not adverse to Cerre's grant, unless the testimony convinced the jury to the contrary.

Is Cerre's claim an inchoate concession?

4. The eighth instruction of plaintiff is, that Trudeau's decree is a concession for purpose of a common; this must be intended as to the land south of the river Des Peres, or it is totally irrelevant.

We contend it is no concession in terms, nor by implication.

5. The ninth instruction of plaintiff is exceptionable on same grounds as the seventh, and it is ambiguous. By *confirmation* cannot be meant the recorder's certificate, but the giving or ratification of title.

This instruction supposes such confirmation operated at its date, to a certain defined extent, to give title south of the river Des Peres.

6. The tenth instruction of plaintiff is exceptionable, on nearly all the grounds taken as to the others:—

It assumes, and withdraws from the jury, that Cerre's grant is within the claim to commons, as filed before the board.

It assumes, that the survey of Brown is the boundary of said confirmation of commons.

It assumes, that the claim to commons as filed, and the confirmation of same, were adverse to Cerre's concessions; a question for the jury.

It assumes, that there was a *concession*, or *user*, as commons, south of the river Des Peres.

8. The instructions of defendant below ought to have been given; their legality depends on the questions already considered. The second assumes, that the lease passed no title, not being executed in the corporate name.—2 Bac. Abr., 5, 6.

ALLEN, for Appellee.

The instructions asked and given on part of plaintiff, and the fourth, eighth, eleventh, twelfth and thirteenth, asked and refused on part of defendant, to the giving and refusal whereof exception is taken, resolve themselves into these inquiries:

1. Was there any commons confirmed to the inhabitants of Carondelet? and if so,
2. What was the extent of such confirmation? and,
3. Was it adverse to the claim of Cerre, under which defendant claims?—all which are questions of law arising on the evidence in the cause.

The second instruction asked and refused on part of plaintiff, is the same with the instruction asked and refused on part of defendant, at close of plaintiff's testimony.

The fifth instruction asked and refused on part of defendant was well refused: 1st: It submits to the decision of the jury a question of law; 2d: It goes behind the confirmation, and assumes, however adverse the confirmation may be to the concession of Cerre, yet, if the claim of common was not adverse, the confirmation did not affect any land within that concession, thereby denying the legitimate effect of the confirmation. See twelfth and thirteenth instructions.

The sixth instruction asked and refused on part of plaintiff was well refused.

1st: It submits to the decision of the jury a question of law.

2d: It assumes, that unless there was a concession, grant, or survey, the confirmation is a nullity. See seventh instruction.

The seventh instruction asked and refused on part of defendant was well refused:

1st: It was a grant; and if not,

2d: It was a question which was wholly immaterial to the case, and, no matter how decided, could not affect the result.

The ninth instruction asked and refused on part of defendant was well refused. It was a duly certified survey, and was evidence under the statute. It was a survey made under authority of law, and by a sworn and competent surveyor, duly certified, and was evidence, though not conclusive, yet entitled to such weight as the jury might give to it. Moreover, Brown, who made the survey, was a sworn witness in the case, and confirmed, by his testimony, the survey, as did also Wm. Milburn, the surveyor-general, as sworn witness in the case.

The tenth instruction asked and refused on part of defendant was well refused.

It submitted to the decision of the jury, what was the extent of the claim to commons, which was a question of law, and besides disregarded altogether the confirmation of common which was the title on which the plaintiff was to recover. It also submits to the jury the correctness of the survey, which is a question of law. See eleventh instruction.

As to the inquiry first above mentioned, Was there any commons confirmed to the inhabitants of Carondelet? the Court is referred to the proceedings before the board of commissioners—the notice of claim—the concession of Zenon Trudeau, of 7th December, 1796—the certificate of Soulard, dated 25th December, 1797,

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and 18th February, 1806—the petition of, and concession to, Alvarez, 18th Nov., 1496—Russell's survey of same in year 1811—petition of, and concession to, Charles Valle, 11th April, 1797—opinion of William McKee, surveyor-general, which is herewith exhibited—of the other surveyors-general found of record, to wit, Rector, Langham, Milburn and Brown—the testimony of user as commons—Delor's testimony, American State Papers—Gale and Seaton's edition Public Lands, vol. ii., p. 672, 447, 449, 450, 451—D. Green's edition, vol. ii., 549, 377, 378, 379; vol. iii., 587, 677—5 Term Rep., 124—3 Cruise's Digest, p. 111, sec. 39—4 Com. Digest, 536—1 Coke Litt., 815, top-paging—Thomas' edition Acts of Congress of 13th June, 1812; 26th May, 1824; 27th January, 1831—6 Mo. Rep., 510—7 Mo. Rep., 7.

As to the inquiry second above mentioned, What was the extent of such confirmation? the Court is referred to the proceedings before the board of commissioners—the notice of claim—the concession of Z. Trudeau, of 7th December, 1796—the certificate of Soulard, dated 25th December, 1797, and 18th February, 1806—the petition of, and concession to, Alvarez, 18th November, 1796—Russell's survey of same, 1811—petition of, and concession to, Charles Valle, 11th April, 1797—opinions of Wm. McKee, surveyor-general, herewith presented, and of the other surveyors-general, Rector, Langham, Milburn and Brown—testimony of user as commons—Delor's testimony, American State Papers, above cited—Greenleaf's evidence, 154-5, 164-5, 332—Acts of Congress, 13th June, 1812, 26th May, 1824, and 27th January, 1831.

As to the inquiry third above mentioned, Was it adverse to the claim of Cerre, under which defendant claims? the Court is referred to 6 Mo. Rep., 510—7 Mo. Rep., 7, 16—and to the proceedings on, and confirmation of commons, claimed by Saint Louis, and the survey of same—American State Papers, as cited above, vol. ii., p. 671—D. Green's edition, vol. ii., p. 549.

No argument can be drawn against the position, that the confirmation of the Carondelet commons was adverse to the concession of Cerre, on the ground that the same was within the exterior lines of the commons, and was therefore not intended to be adverse to the same, for this might be said as to the operation of the confirmation of the commons of St. Louis, within the exterior lines of which were many concessions unconfirmed, and which have since been confirmed by act of 4th July, 1836.

The claims within the commons of Carondelet, and which are set out in the record, with their dates, and that of their confirmations, are omitted.

As to the second instruction asked and refused on the part of defendant, which brings up the validity of the lease, the Court is referred to the act of incorporation by the court—acts of Assembly of 26th January, 1825, secs. 1, 2, and 5; 22d Dec., 1824, sec. 1; 6th Feb., 1839—the lease to the plaintiff—the various testimony as to possession, by inhabitants of Carondelet, of the commons as claimed by them, to wit, Brown, Delor, Tiernan, LeBlow, Primm, Linkneyer, and the ordinances of the corporation—the payment of rent by plaintiff, under lease to him of premises sued for—the various ordinances in evidence, particularly of 16th January, 1836, in relation to the lease to Jesse Pritchett, of 6th February, 1836, authorizing

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the board of trustees to lease the commons; and of 3d March, 1838, authorizing the commons to be leased—13 Johnson's Rep., 38—Angel and Ames on Corporations, p. 54-57.

TOMPKINS, J., delivered the opinion of the Court.

John Bingham brought his action of ejectment against Frederick Dent, in the Circuit Court of St. Louis county. The judge of that court having been counsel in the cause, it was removed to the Court of Common Pleas. Bingham obtained a judgment in the last-mentioned court, to reverse which, Dent prosecutes this appeal.

On the trial of the cause, the plaintiff proved the incorporation of the town of Carondelet on the 20th day of August, 1832.

The order of the court recites, among other things, that, from henceforth, the inhabitants, &c., shall be a body politic and corporate, by the name and style of "The Inhabitants of the Town of Carondelette."

Bingham claimed the land sued for, under the town; and the instrument of writing by which he claims purports to be made and executed by and between "The board of trustees of the town of Carondelette aforesaid, parties of the first, and John Bingham party of the second part."

It was admitted that, at the commencement of this suit, the defendant was in the possession of the portion of lot No. (41) forty-one in the land claimed, and laid off by the inhabitants of the town of Carondelet as commons, which was included within the lines of the survey of the confirmation to Gabriel Cerre, under a concession made to him in 1789, to be hereinafter noticed, which portion contained 28½ acres, according to the plat and survey made by order of the Court in this case.

The plaintiff then gave in evidence the proceedings before the board of commissioners appointed under the act of Congress of 2d of March, 1805.

On the 7th June, 1808, they gave notice of their claim to the recorder of land titles for the territory of Louisiana, by which it appears, that the inhabitants of Vide Poche, (Carondelet) in the district of Saint Louis, claim title to six thousand arpens of land, adjoining said village, by virtue of a concession from Don Zenon Trudeau, lieutenant-governor of Upper Louisiana, dated the 7th of December, 1796.

The second document is a petition on behalf of the inhabitants of the village, signed by Jean B. Gamache. This petition, dated 6th December, 1796, refers to one previously presented, on the 5th October then next preceding, both praying a continuation of their lands; by which, I presume, is meant, an extension or increase of the quantity of their land, for the purpose of cultivation.

To this petition, the lieutenant-governor answers, that "The land which is demanded is included in what has been reserved for the supply of the wood necessary for the village of Carondelet, and the demand of Mr. Gamache cannot take place; as also, all the concessions granted in the direction of the line taken

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at the end of the lands of the said village, and running parallel with the Mississippi river, one hundred and fifty arpens lower down." All these documents appear to have suffered, probably from the fact of the several transcribers being unacquainted with the French language. The meaning of the above passage seems to be this: "that the demand of Mr. Gamache cannot be allowed; and that no other concessions made in the direction of a line beginning at the (west) end of the lands of the village, and running parallel with the river Mississippi, one hundred and fifty arpens lower down, can be allowed."

From all the evidence introduced, we collect, that the land lying betwixt this line and the river (which lies east of the line) was intended to be reserved at least from occupation by individuals, and therefore denied by him to the village for cultivation; and an intimation was given, that those who had located their claims or concessions on that ground, would not be allowed to obtain a grant from the intendant, the agent of the crown. In all the petitions which I have seen, the petitioner seems to consider himself bound to provide that his location do not interfere with others.

Next in order comes the certificate of Mr. Soulard, the surveyor, dated the 25th December, 1797; in which it is stated, that on the 21st day of December, in virtue of the order which the lieutenant-governor directed to M. de Triget, captain-commandant of said village, to enjoin to the inhabitants to make known the line of a tract of land which had been granted to them, under date of 7th of December, 1796, which line is to be parallel with those of Messrs. Antonie, Reilhe and Alvarez. The said inhabitants, in the presence of their commandant, agreed to have their line drawn, (run) to be taken from the last butt (probably stake) set at the extreme part or depth of their land, which had been previously surveyed by Mr. Pierre Chouteau. (that is, they agreed that their line should begin at the south-west corner of their common fields, or forty-arpens lots.) These lots appear, from the surveys in evidence, to lie west of the town; and as the commons lay south of the common-field lots, the beginning corner of the survey of the commons would be the south-west corner of that common field. The surveyor then states, that, "Having found the course of these western lines of the common fields, or forty-arpens lots, to be S. 28 west, he followed the same course 23 arpens $3\frac{1}{2}$ perches, at which distance he found the river Des Peres. The end of the line on the border of the said river has been marked with a little stone, having for witness two flints and a ball of lead flattened, &c. And that this may serve the said inhabitants as proof thereof, I have given these presents at Saint Louis, of Illinois, the 25th of December, 1791. Signed," &c.

In another certificate, dated February 18, 1806, Mr. Soulard, the same surveyor, certifies, that the inhabitants of the village of Carondelet required him to measure for them, either by himself or by one of his deputies, the land which had been granted to them for commons, by the lieutenant-governor, Don Zenon Trudeau; that Mr. Bartholomew Cousin went to the village of Carondelet for that purpose; that, at the moment of proceeding, the compass was out of order, and could not be made immediately fit for use, &c. No survey was made. The recorder of land titles, on the 22d day of August, 1834, certifies, that this claim

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to commons is confirmed under the provisions of the first section of the act of Congress of 13th June, 1812, entitled, "An act making further provisions for the settling the claims to land in the territory of Missouri, and of the several acts of Congress supplementary thereto," approved on the 26th day of May, 1824, and of the 27th January, 1831, and refers to the plat. The tract of land bounded west by a line running, as above-mentioned, parallel with the line of Alvarez, 150 arpens, contains 9906 acres and $\frac{29}{100}$, betwixt it and the Mississippi, according to Brown's survey, made by order of the court in this cause.

The petition of Alvarez was also given in evidence, and all the proceedings on it, to the confirmation, as evidence of the right of common enjoyed east of his land before the concession made to him on the 15th of November, 1796.

The material parts of the petition, as translated by the late Judge Leduc, are in these words: "Egenis Alvarez, habitant, resident, &c., humbly petitions your worship to be pleased to grant him, as a title of property, the vacant land which is situate departing from the limits of the '*establishment*' of Carondelet, as far as those of Mr. Reilhe, which your petitioner considers to be about six arpens in front, facing the river Des Peres, by forty arpens in depth, and on the other side of said river ten arpens in front, departing from the said limits of Carondelet, and terminating with lands of the domain, by forty in depth, the whole without prejudice to any person, subjecting himself, as he should do, to the provisions of the laws; which favor he hopes to gain of your grand equity."

Dent, claiming under Gabriel Cerre, proved notice to the recorder of land titles on the 28th November, 1812, and the concession by Perez, dated 15th of March, 1789. In February, 1833, the board recommended this claim, amounting to 6000 arpens, for confirmation, and it was confirmed by the act of 4th July, 1836.

Of the instructions asked by the plaintiff, the court gave—

The 1st: *viz.*, That the act of Congress, approved the 13th of June, 1812, entitled, "An act making further provisions for settling land claims in the territory of Missouri," and the act of Congress approved the 27th of January, 1831, entitled, "An act further supplemental to the act entitled, 'An act making further provisions for settling the claims to land in the territory of Missouri,' passed the 13th of June, 1812," confirmed to the inhabitants of the village of Carondelet, *alias* Vide Poche, all the land lying south of the common fields of Carondelet, and the village of Carondelet, and between the Mississippi river and a line run from the south-west corner of the said common fields, running south 28 west, one hundred and fifty arpens, saving and excepting therefrom all claims theretofore confirmed by the board of commissioners for adjusting and settling claims to land in the territory of Missouri, and all complete grants within the said limits made by the French or Spanish governments, while those governments respectively had possession of the country, and such confirmation takes effect from the approval of said acts of Congress.

The 2d: That if the jury believe, from the evidence, that the land in the declaration mentioned, or any part thereof, is within the exterior lines of the claims to commons confirmed to the inhabitants of the village of Carondelet by the act of Congress approved 13th of June, 1812, and that of 27th January, 1831, entitled

as above in first instructions, and not embraced within any claim theretofore confirmed by the board of commissioners for settling and adjusting claims to land in the territory of Missouri, nor any complete grant made by the French or Spanish governments, while those governments respectively had possession of the country, and that the defendant, at the time of the commencement of this suit, was in possession of the said land in the declaration mentioned, or any part thereof, then, as to the same so possessed and within such exterior lines, the plaintiff is entitled to recover in this action.

The 7th: That the claim of the inhabitants of the village of Carondelet, as presented to the old board of commissioners, and given in evidence in this case, was adverse to all concession inchoate within the extent of the claim, which were not expressly, or by necessary implication, excepted therefrom.

The 8th: That the order of the lieutenant-governor, on the petition of Gamache, constituting a part of the documents before the board of commissioners, which, with the proceedings thereon, have been heard in evidence in this case, is a reservation by legal authority, and is in effect a concession for the purpose of commons.

The 9th: That the confirmation of commons to the inhabitants of the village of Carondelet, read in evidence in this case, was adverse to all concessions within the extent of this confirmation which had not been previously confirmed, or were not complete titles under the French or Spanish governments.

And the 10th: That the claim for commons before the board of commissioners, and acted upon by Congress, in passing the act of 13th June, 1812, and read in evidence in this case, embraced the grant within the lines of the commons made to Gabriel Cerre; and the confirmation of that claim by the act of 13th June, 1812, and the relinquishment by the supplemental act of the 27th of January, 1831, passed the legal title to all the land within such lines, which was in the United States; and the subsequent confirmation of the grant to Gabriel Cerre, read in evidence, passed no title which is a bar to the recovery by the plaintiff in this action.

The court refused to give the third, fourth, fifth, sixth and eleventh instructions asked by the plaintiff.

The defendant then asked, and the court refused to give, the instructions following:

2d: That the lease to the plaintiff, by the board of trustees of the town of Carondelet, given in evidence in this case, passed no title to the land in question, on which a recovery can be had.

4th: That no land was confirmed to the inhabitants of the town of Carondelet, under the act of Congress of the 13th June, 1812, south of the river Des Peres.

5th: If the jury believe, from the evidence, that the claims of the inhabitants of the village of Carondelet for commons, as presented to the board of commissioners, and given in evidence in this case, was not adverse to the claim of Gabriel Cerre under which the defendant claims, then the confirmation, under the said act of Congress of 13th June, 1812, did not affect any land within that concession.

6th: If the jury believe, from the evidence, that there was no grant, concession or survey of any kind south of the river Des Peres, as commons for the village of Carondelet, nor any use of land there for that purpose, under or by the authority

of the Spanish government, then the act of Congress aforesaid did not confirm any land there as commons.

7th: That the decree, or reply of Lieutenant-governor Trudeau to the petition of Gamache, dated 7th December, 1797, given in evidence by the plaintiff, is no grant or concession of any land to the inhabitants or village of Carondelet for commons.

8th: That no land was confirmed as commons for the village of Carondelet by the said act of 13th June, 1812, westwardly of the line indicated in the said decree of Zenon Trudeau, which is a line commencing at the south-west corner of Carondelet common-field lots, and running one hundred and fifty arpens parallel with the Mississippi river.

9th: That if the jury believe, from the evidence, that the commissioner of the general land-office has officially disapproved of the survey of the commons of Carondelet, by Joseph C. Brown, (given in evidence by the plaintiff,) and ordered a new survey thereof, that then the said Brown's survey is no evidence of the extent or boundary of the said commons.

10th: That the said survey of said commons by said Brown, if not made in conformity to the claim to commons by the inhabitants of Carondelet before the old board of commissioners, as given in evidence by the plaintiff, is no evidence of the extent or boundary of said commons, as against the concession to Gabriel Cerre, given in evidence by the defendant.

11th: That Brown's survey of said commons is not in conformity with the claims aforesaid to commons, as confirmed by act of Congress of 13th June, 1812.

12th: That the confirmation of the claim of the inhabitants of Vide Poche to commons, as presented to the board of commissioners, is not more extensive than the claim; and that, if the claim to the 6000 arpens, as asserted before the board of commissioners, can be satisfied without interfering with the land claimed before the board by Gabriel Cerre, and afterwards confirmed by the act of 4th July, 1836, then the plaintiff is not entitled to recover for any land embraced in the claim of said Cerre.

13th: That the grant by Zenon Trudeau, lieutenant-governor, dated 7th of December, 1796, does not annul the grant within the lines of the commons made to Gabriel Cerre; and that the claim for commons before the board of commissioners, and acted upon by Congress, in passing the act of 13th June, 1812, has no greater effect than the said grant, and does not cover the land embraced within the said claim of Cerre.

The court gave the first and third instructions asked by the defendant.

The only evidence of the right of the village of Carondelet to the land here claimed as commons, is in the refusal of the lieutenant-governor, Trudeau, on 7th of December, 1796, to grant the said village a tract of land for cultivation, on the petition of Gamache above mentioned, and in the certified return of Mr. Soulard, of a survey made on the 21st day of December, by virtue of an order which the lieutenant-governor directed to Mr. De Triget, captain-commandant of said village, to enjoin on the inhabitants to make known the line of a tract of land which had been granted to them under date of the 7th December, 1796, which

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line is to be parallel with those of Alvarez and Reihle. It is then stated that the inhabitants, in the presence of their commandant, agreed that their lines should begin as above explained, at the south-west corner of their forty arpens or common-field lots. The return of Mr. Soulard being official, and being made in obedience to an order of the lieutenant-governor, which order must be supposed to be lost, as we are told by General Milburn, who had been surveyor-general, that it could not be found in the office while he had the control; this return, I say, must be considered of higher authority than the declaration of Trudeau, made in his answer to the petition of the village, presented to him through Gamache, the only object of that answer being to tell Gamache that his demand could not be allowed.

It was proper for him to speak with more precision to the surveyor who was to execute his order, than to Gamache, who was only a petitioner in behalf of the village, and whose petition the lieutenant-governor, in said answer, intended only to refuse. In his order, which was the warrant for the survey made by Mr. Soulard, it is stated, that the line of the grant was to be parallel to the lines of Reihle and Alvarez, and the villagers were required to show at what point they would begin. They chose to begin at the south-west corner of their common fields, or forty-arpens lots.

They might have begun any where, in the line of their forty-arpens lots, betwixt the eastern and western ends. They chose to begin, as above stated, at the south-west corner of their forty-arpens lots, so that their commons were to be bounded on the north by the forty-arpens lots, on the east by the Mississippi, on the west by a line parallel to the lines of Reihle and Alvarez, and on the south by a line to include, as the petitioners admit, 6000 arpens; and where this closing line must be traced, that is to say, at what distance it was to commence from the place of beginning, (the south-west—of the common fields, or forty-arpens lots,) on the line directed by the lieutenant-governor to be run parallel with the lines of Reihle and Alvarez, could be ascertained by actual survey only. It is not only absurd to suppose that the lieutenant-governor would, in his office, pretend to dictate how long that western line must be to contain 6000 arpens of land, but it is contrary to the practice of such officers. They prescribe the quantity, and leave the remaining part to the party petitioning, and the surveyor.

To make common sense of the writing called Gamache's petition, (in itself unintelligible, either in the original or the translation,) we must suppose that Gamache and the villagers had some previous knowledge of the intention of the lieutenant-governor to decree a grant of commons, and in anticipation of such grant he, Gamache, on behalf of the village, presented the petition on the 6th of December, for a part of this land for the purposes of cultivation; for the lieutenant-governor answers—"The land which is demanded is contained within that which is reserved to furnish the wood which is necessary to the village of Carondelet, and that the demand cannot be allowed, (*ne pent avoir, lien, &c.*,) nor any others made in the direction of a line beginning at the end of the lands of said village, and running parallel to the Mississippi, one hundred and fifty arpens

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lower down." The answer to the petition is dated on the 7th of December, 1796, one day later than the petition itself.

Mr. Soulard, in his official certificate, states this concession of commons to have been made, on the 7th of December, 1796, and according to him the western line of the commons was ordered to be parallel—not to the Mississippi, but to the lines of Reilhe and Alvarez, and the inhabitants were to make known the beginning, and nothing is said to Mr. Soulard about the length of this line. The very object of the survey was to ascertain the length of that line.

It cannot surely be supposed, that Mr. Soulard, the surveyor, was so grossly ignorant as to call this answer to Gamache's petition a grant of commons to the village. We must suppose, then, that he recites truly the concession, and that it is lost.

The answer of the lieutenant-governor was accurate enough for the purposes of Gamache, and for those whose interests he represented—that they could obtain no land betwixt the Mississippi and a line drawn from the south-west corner of the common-field lots of Carondelet, one hundred and fifty arpens lower down, parallel to the river. This was accurate enough for their purposes, especially as he intended, on the same day, to make the order of survey, and, according to Mr. Soulard's recital in his official act, did make it. Mr. Trudeau might have thought the lines of Reilhe and Alvarez to be parallel to the Mississippi, for let it be recollected, that he did not there have before his eyes, as we now have, the plat made by Mr. Brown *forty years* afterwards.

The answer to the petition of Gamache was sufficiently accurate for common purposes: but when he addresses the officers who were to carry his orders into execution, his tone is changed; he is accurate and precise; the western line of the commons is to be parallel to the lines of Reilhe and Alvarez; the villagers may choose the place of beginning. Their interest was the inducement to begin on the southern boundary of the common-field lots; and the length of that line, to contain, betwixt it and the Mississippi, 6000 arpens, must depend on its distance from the Mississippi. And the answer to Gamache's petition is, that the western line will begin at the south-west corner of the common-field lots, and run 150 arpens lower down, parallel to the river Mississippi, within which limits he, the lieutenant-governor, might be assured the quantity of 6000 arpens would be included. As has been observed, the petition for these commons, and the order of survey, must be presumed to be lost, or rather we are left to presume, from the certified return of the surveyor, that there was a petition for the common, and a decree in favor of the petition, and that, by the decree, the petitioners were allowed to choose the place of beginning, provided the line were parallel to the lines of Reilhe and Alvarez. The petitioners themselves have furnished the amount of land prayed for and accorded to their prayer, and it is quite idle to suppose that the lieutenant-governor would, from his office, pretend to dictate to the surveyor of his district how long that line must be, to contain betwixt it and the Mississippi the quantity of land which he conceded; much more idle would it be to suppose that he should, in his answer to Gamache's petition, given on the same day, be supposed to be making out an order, under which Mr. Soulard, the surveyor,

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was intended to act. We are driven, then, to the conclusion, that the statement of the place of beginning, and the course of the western boundary line, as set out in Mr. Soulard's official act, is true: this statement is certainly the highest evidence, after the petition and decree, and cannot be disproved by anything else than the absent documents themselves, *viz.*, the petition and decree. In fact, the answer to Gamache's petition is not admissible evidence in this case: it is no more than hearsay evidence on another subject.

We may certainly trust the petitioners for the quantity; their modesty would not hinder them from asking enough; and it is so absurd to suppose that Mr. Trudeau would order the surveyor how long to make that western line, he himself not even knowing how far west of the river the villagers might elect to fix the north-west corner of their commons, that we are equally driven to the conclusion, that it was intended that Mr. Soulard, the surveyor, should ascertain the length of that line, in order to include the quantity of 6000 arpens, a work, it must be admitted, of some labor, inasmuch as it is in evidence that neither is the line parallel to the river, nor is the river exactly straight opposite to that line.

In my opinion, then, the western line of the commons was run in the proper direction, as reported in the survey of Mr. Brown given in evidence, but that line should have continued so far only from the south-west corner of the common-field lots, as to include betwixt itself and the river the quantity of 6000 arpens; and whether the land in dispute would be included within such limits, does not appear on this record.

But it is contended, that the petition of Alvarez is evidence of the existence of commons south of the river Des Peres previous to his concession, which is one month previous to the concession of commons recited by Mr. Soulard's official return. To say nothing of the absurdity of a title accruing without concession, which could accrue only by concession, and by the complete title issuing from the intendant-general, let us resort to the petition itself: it prays for land to depart both north and south of the river Des Peres, from the "*limits of the establishment of Carondelet*;" and it is contended, that this means the commons of Carondelet. The corresponding Spanish word is, *Establecimiento*: in French, it is *Ettablissement*: in English, *Establishment*: all derived from the Latin, *Stabilimentum*, I suppose, as we are told, by Ainsworth, the English word *Establishment* is, and this word means nothing more, in the popular language of the French of Missouri, than is implied, in the popular language of the Anglo-Americans of the same country, by the word "settlement." A creek in Saint Genevieve county is extensively known by the name of the "Establishment creek," on account of a settlement made there, many years since, by some French families. No man, even moderately acquainted with the history of the Spanish language, could believe, that a Spanish word, derived from the Latin "*stabilimentum*," or one which corresponded to the French word "*etablissement*," would be used for the English word "common;" and still less can it be believed that the translator to the board of commissioners, who, it is well known, had been secretary to the Spanish lieutenant-governor, would have failed to translate the word "common," instead of establishment, as he has rendered it. But what establishment or set-

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tlement had the village of Carondelet, from the limits of which Alvarez prayed that his land might depart? The answer is easily made from the record. It was this mill, and a cabin or two, perhaps, near it, which Gamache mentions, and which emboldened the villagers, with a presumption truly corporate, to demand all the land from the Mississippi river on the east, to the farm of Constant on the west, and from the river Des Peres on the south, to the village lots on the north, about three thousand acres, perhaps. It may be fairly presumed, that they had long claimed this land as appurtenant to the mill, of which Gamache speaks very ostentatiously in the petition above mentioned. It might thus have acquired the name of the establishment of Carondelet; for it requires no stretch of imagination to enable one to conjecture that the mill was on the river Des Peres, and on the land prayed for. But it is idle to say, that a letter of Trudeau, denying certain lands to the village for purposes of cultivation, is a decree granting the same lands to the same village for commons: and the official return of Mr. Soulard is evidence that a decree had been made; and, as is contended by Mr. Gamble, the village must either take the survey where he terminated it, on the bank of the river Des Peres, or they must take the quantity demanded, 6000 arpens. The certificate of Mr. Soulard, subsequently given, (in 1806) is not evidence. His authority to survey, under a decree of the Spanish officer, had then ceased. It cannot, however, be said that his proper return shows that he had completed his survey, but it shows rather the contrary. The survey, then, ought to be completed in conformity to what is learned from Mr. Soulard's return, and the quantity stated by the petitioners.

It remains to be inquired, whether the confirmation certified by the recorder, on the 22d of August, A.D. 1834, to have been made for 6000 arpens, in virtue of the act of 13th June, 1812, entitled, "An act making further provisions for settling claims to land in the territory of Missouri," and other acts of Congress, to wit, the act of 26th May, 1824, and that of 27th January, 1831, be adverse to that of Dent claiming under Gabriel Cerre. It will be borne in mind, that the concession to Cerre was made on the 15th of March, 1789, by Perez, seven years before that to the village of Carondelet. Whenever the term prescribed to one board has expired, Congress have created another tribunal, excluding from it the right to adjudicate on cases already decided. Frederick Bates, under the act of 13th June, 1812, was clothed with all the powers of the first board, but cases decided on by that board were withdrawn from his jurisdiction.

In *Bird vs. Montgomery*, 6 Mo. Rep., it appears, that the claim to the Saint Charles commons, confirmed by the act of 1812, prevailed over that of Guigarré reported by the recorder for confirmation in 1815, and consequently confirmed by the act of the 29th April, 1816, p. 510. In the case of *Newman vs. Lawless*, 6 Mo. Rep., 293, I advanced the opinion, that the act of 1812, and the above-mentioned act of 1824, availed the several claimants of village lots, out-lots, and commons, nothing, unless they presented their claims before the recorder, but operated only to reserve those lots and lands from sale. Congress, in passing the act of 1824, seems to have entertained that opinion also. In this case, the president of the court did not sit, and my colleague, Judge Napton, concurring in

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the judgment entered, expressed, in writing, his dissent on the point above mentioned. In the case of *John Hammond vs. President and Directors of Saint Louis Public Schools*, decided at this term, (July, 1843,) I expressed the same opinion, and gave my reasons more at large than in the case of *Newman vs. Lawless*. But neither of the sitting judges expressed either assent or dissent, although they gave a separate opinion.

According to my opinion, then, on the last-mentioned point, the corporation, not having appeared, on this record, to have brought their claim either before the recorder or the late board of commissioners, have shown no title to any commons, and the plaintiff in error must, in this view of the case, ultimately gain it; but it would be decided otherwise, on the authority of *Bird vs. Montgomery*, 6 Mo. Rep., 510, above mentioned.

The survey of Mr. Brown not being made, as I believe, according to the intention of the lieutenant-governor, Trudeau, the Court of Common Pleas committed error in giving the first and second instructions asked by the plaintiff below.

For the same reason, I am of opinion, that the tenth instruction demanded by the plaintiff below, defendant in error here, should not have been given.

In the seventh instruction asked by the defendant in error, I can see no meaning. I suppose that every person and every body corporate, that presented a claim before the old board of commissioners, set up a claim adverse to all the world, except the United States; and one principal object in the establishment of that board was, to separate the private property of one individual from that of another, and to ascertain to which of two individuals, claiming the same property, that property belonged. That board does not appear, on this record, to have confirmed the village claim to commons; and the claim filed before that board, consequently, amounts to nothing. The seventh instruction, then, should not have been given.

The eighth instruction was, in my opinion, most erroneously given; for the lieutenant-governor made no order on the petition of Gamache, in this record set forth, except, that the village of Carondelet could not obtain the land demanded by it, for the purpose of cultivation. It is true, that he assigned a reason for refusing that demand, but by no plausible reasoning ever can that reason, assigned for refusing the land demanded by the inhabitants of Vide Poche, for purposes of cultivation, be tortured into a concession to the inhabitants of the said village of 9,905 $\frac{2}{10}$ acres of land for commons. It does not even amount to a verbal promise, or any kind of a promise, to do so; he says it is reserved! How reserved? No surveyor would receive this written answer to Gamache's petition as an order to survey so much land for commons. If, then, there is any evidence of their claim, it is contained in the return of Mr. Soulard, above mentioned, as certified by him. The eighth instruction, then, should not, in my opinion, have been given.

The ninth instruction. If any confirmation of commons to the village of Carondelet was read in evidence, it has escaped me, as it well may have done, in such a mass of matter appearing to me wholly irrelevant. Mr. Conway, the recorder, certifies that the claim to 6000 arpens was confirmed by certain acts of Congress, of which, I suppose, this Court was in duty bound to take notice. According to the

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case above mentioned, of *Bird vs. Montgomery*, 6 Mo. Rep., 510, this instruction should have been given. In my opinion, there has been no confirmation of this land, or any part of it, to the village, inasmuch as the several acts of Congress, as I have above said, operated only to reserve this land from sale by the register and receiver, and to appropriate to the use of the United States, for military purposes and for schools, such part as should not be proved before the recorder to be either private property or commons, and it was still the duty of all parties claiming town or village lots and commons, after the act of 1812, and the other supplementary acts, to come in and make proof, before the recorder, of their respective claims, for the purpose, as well of ascertaining the property of individuals and towns and villages respectively, as of separating the private property of each person, town or village, from that of the United States and the schools.

Of thirteen instructions asked by the plaintiff in error, the court refused the second, fourth, fifth, &c., but gave the first and third.

The second instruction asked by the plaintiff in error should, in my opinion, have been given. As above mentioned, the inhabitants of Carondelet were incorporated by the name and style of "The Inhabitants of Carondelet," and the lease purports to be executed by and between the trustees of the town of Carondelet, parties of the first part, and John Bingham, party of the second part.—See 2 Bac. Ab., 5 and 6.

4th *Instruction*.—It does not appear, from the survey, how much land lies north of the river Des Peres. I should say that, according to the decisions of this Court hitherto made, 6000 arpens of land were confirmed to the village, to begin at the south-west corner of the forty-arpens lots, and run for quantity parallel to the lines of Alvarez and Reilhe; but my present belief is, that the village can get nothing, as its claim does not appear on this record to have been presented to the recorder, or to any board of commissioners, for the ascertainment of its limits.

5th *Instruction*.—I have above said, that, in my opinion, each claim presented before the first board of commissioners was adverse to the other, and that, consequently, each claimant was bound to attend, and contest every claim conflicting with his own.

6th: The sixth instruction should not, in my opinion, have been given, the village being entitled, in my opinion, to 6000 arpens, surveyed as above mentioned, and the survey does not show whether there was 6000 arpens north of the river Des Peres.

7th: The seventh should, in my opinion, have been given.

8th: This instruction should not have been given: the only legitimate intimation of Trudeau's will, of which we have any evidence, is contained in Mr. Soulard's certified return of his survey, and this calls for a line running parallel to the lines of Reilhe and Alvarez.

9th: This instruction should not have been given: the right of property in the contested land is to be decided by the laws of the United States, as pronounced by the courts, established by act of Congress, either of general or special jurisdiction, and not by the commissioner of the general land-office, a mere ministerial officer.

10th: This instruction should have been given.

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11th: This instruction, also, should have been given, as the village claimed only 6000 arpens, and Mr. Soulard's certificate shows, that the length of the western line was not prescribed to him by any legal authority, and common sense shows that no such order could have been given by the lieutenant-governor.

12th: I cannot see any propriety in the twelfth instruction. It was the duty of Gabriel Cerre to attend the board: nothing hindered him from attending the old board; and if, by his neglect to do so, he lose his land, he has no reason to complain. The grant of the lieutenant-governor was a nullity, until ratified by a patent from the intendant, and he, having shown gross negligence under the Spanish government, can have nothing to urge against the United States, before whose commissioners he has neglected to appear, to adjust his claims.

13th: This is answered in the twelfth instruction.

The judgment of the Court of Common Pleas is reversed.

SCOTT, *Judge*.—I concur with Judge Tompkins, in reversing the judgment.

The confirmation of the claim to the commons was not by metes and bounds, and only so much land passed as was actually claimed by the inhabitants, in the notice which was filed with the recorder of land titles. They claimed 6000 arpens, and are entitled to that quantity, in the direction indicated in their claim; and if that quantity can be had, without interfering with the rights of others, I do not see on what principle they can be disturbed in the enjoyment of their possessions. In the cases of the St. Louis and St. Charles commons, surveys accompanied the claims, and the title to the lands comprehended within the limits of the surveys were declared to have passed by the act of confirmation. In this case a survey is not relied on, but a declaration from the lieutenant-governor, in answer to a petition for a concession of land. As the claim was for a quantity, and not by metes and bounds, the plaintiff is entitled to the quantity claimed, and no more.

NAPTON, *Judge, dissenting*.

This was an action of ejectment, to recover a lot of ground, in St. Louis county, lying south of the river Des Peres, and embraced within a survey of the supposed commons of the town of Carondelet. The plaintiff held a lease for ninety-nine years, from the board of trustees of Carondelet.

The town of Carondelet was incorporated in 1832, by the County Court of Saint Louis, by virtue of the authority vested in said court, by an act of the General Assembly, approved 16th January, 1825, entitled, "An Act to provide for the incorporation of towns."

The lease made to the plaintiff (below) was in the name of the "Board of Trustees of the Town of Carondelet," and was by virtue of an act approved December 22d, 1814, entitled, "An Act concerning Commons." The town was incorporated by the name of "The Inhabitants of the Town of Carondelet."

It was admitted, that the defendant, at the commencement of this suit, was in

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possession of that portion of the lot described in the declaration as claimed and laid off by the inhabitants of the town of Carondelet as commons, which was included within the lines of the survey of the confirmation to Gabriel Cerre, under a concession made to him in 1789, which portion contained $28\frac{1}{2}$ acres, according to the plat and survey made by order of the court in this case.

The title of the town of Carondelet to commons, under which plaintiff claimed, rested on the proceedings before the recorder of land claims and the board of commissioners, and the act of 13th June, 1812, all of which are set forth at large in the bill of exceptions, and appear to be, in substance, as follows:—

1st: On the 7th of June, 1808, the inhabitants of Carondelet filed with the recorder of land claims for the territory of Louisiana, a notice of their claim, which was as follows:—"Take notice, that we, the inhabitants and settlers of the village of Vide Poche, in the district of Saint Louis, claim title to 6000 arpens of land, situate adjoining said village, by virtue of a concession from Don Zenon Trudeau, lieutenant-governor of Upper Louisiana, dated 7th December, 1796." This notice was accompanied with the documents alluded to therein, to wit—

2d: The petition of Jean B. Gamache, on behalf of the inhabitants of the village of Carondelet, asking of the lieutenant-governor, Trudeau, an extension of their common fields, so as to embrace a tract of land bounded by that of Benjamin Constant, and the Mississippi and the River Des Peres, lying north of said last-mentioned river.

3d: To this petition the lieutenant-governor replies, that the land petitioned for has been reserved for the necessary supply of fire-wood to the village, and the demand of Gamache could not take place: "*Ainsi que toute concessions, accordies dans la direction de la ligne prise a toute des terres du dit village, et courant parallelement au Mississippi, cent cinque arpens plus bas.*" (Nor could these concessions take place, which had been granted in the direction of a line taken from the end of the village common fields, and running parallel to the Mississippi, one hundred and fifty arpens lower down.)—The date of this answer, or concession, was, 7th December, 1796.

4th: The certificate of A. Soulard, dated 25th of December, 1797, stating, that on the 21st December, by virtue of an order directed to him by Mr. De Treget, captain-commandant of said village, enjoining the inhabitants to make known the line of a tract of land which had been granted to them, under date 7th December, 1796, which line was to be parallel with those of Antoine Reilhe and Alvarez, he had proceeded, in the presence of said inhabitants, to make said survey. By consent of said inhabitants, he commenced at the "last butt," set at the extreme part or depth of their land, which had been previously surveyed by Mr. Pierre Chouteau, by virtue of an order from the lieutenant-governor. The course of the western line of the common fields he found to be S. 28° W. The certificate proceeds thus: "I followed the same course (*i.e.*, S. 28° W.) 23 arpens $3\frac{1}{2}$ perches, at which distance I found the river De Peres. The end of the line, on the border of said river, has been marked (*bornee*) with a stone, having for witnesses two flints and a bullet of lead flattened; the land of the said Alvarez being about twenty-four feet distant from said stone, in running the line further in

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a parallel direction. And as this may serve to the said inhabitants as proof thereof, I have delivered these presents at St. Louis, of Illinois, the 25th December, 1797. Antoine Soulard."

5th: A second certificate of Soulard, given the 18th February, 1806, that the inhabitants of Carondelet had again called upon him to measure, or cause to be measured, a part of their commons; that he had deputed Mr. B. Cousin to execute this survey, but that it had not been done, in consequence of finding his compass out of order.

6th: In addition to these documents, there were before the commissioners the depositions of Auguste Chouteau and J. B. Provenchere, conducing to show a claim and user of a common, by the villagers of Carondelet, as far back as 1770.

On the 2d of January, 1812, the board of commissioners rejected this claim.

In addition to these proceedings before the board of commissioners, there was given in evidence, on behalf of plaintiff, a plat and notes of a survey, made by Joseph C. Brown, in March, 1834, in pursuance of instructions from the surveyor-general's office, dated February 10, 1834. This survey was a continuation of the western line, as commenced, or supposed to be commenced, by Soulard in 1797, and embraced 9,905 $\frac{2}{3}$ acres.

Joseph C. Brown was also introduced as a witness in relation to said survey, and stated, that he found marks of an old survey, but not a Spanish survey, below the river Des Peres; also gave it as his opinion, that to run a line parallel with the Mississippi, means a line parallel to the general course of said river; and to run such a line, he would, to embrace the quantity called for, run it parallel to the general course of the river, making due allowance for the loss on the east, occasioned by the windings of the river; but that it was his opinion that the expressions in Trudeau's grant called for an extension of the western line of the common-field lots, and so he had made the survey, and had, in this respect, acted in conformity to the instructions of the surveyors general.

William Milburn, who had been a surveyor-general under the federal government, at St. Louis, also testified, that the extension of the line below the river Des Peres had been originally run by Elias Rector. Witness gave his opinion in relation to the proper construction of the words, "parallel to the Mississippi," which corresponded with that of Brown; but stated, that if he had been directed to make the survey, he would have made it as Brown did, because it had been so commenced by Soulard, under the Spanish government. Witness also stated, that Brown's survey had been rejected by the commissioner of the general land-office, but no other survey had been made.

The plaintiff also gave in evidence the plat and field notes of a survey made by Elias Rector, some time before 1817, and filed in the surveyor-general's office.

The plaintiff also introduced in evidence, proceedings before the board of commissioners and recorder, in relation to six claims, which, by the plats given in evidence on the trial, appeared to be within the claim of commons, as surveyed by Joseph C. Brown and E. Rector.

1st. The claim of Julien Chouquette to 640 arpens. This claim was brought to the notice of the recorder of land titles in 1808, and was founded on improve-

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ments, cultivation and inhabitation, from 1798 till 1803, and was confirmed under the second section of the act of Congress of 3d March, 1807.

2d. The claim of Gabriel Constant to 35 arpens. This was a concession of Lieutenant-governor Trudeau on September 4th, 1795, and it was surveyed by Soulard on 15th April, 1796: it lies entirely north of the river Des Peres. This claim was rejected by the board of commissioners in 1814, but was afterwards recommended for confirmation by the recorder of land titles in 1813, and confirmed by act of 29th April, 1816.

3d. The claim of Gabriel Cerre. This was a concession from Manual Perez, on March 15th, 1789, upon conditions that it was improved within a year from the date of the grant. This claim was rejected by the board of commissioners in 1811. In 1833, it was recommended for confirmation, and confirmed by the act of July 4, 1836.

4th. Pierre Delor de Treget. This claim was filed with the recorder in 1812. It was a petition to Lieutenant-governor Trudeau for 400 arpens on the Gravois, and on the 6th December, 1796, the lieutenant-governor ordered the surveyor to put De Treget in possession, provided the land belonged to the king's domain, and was prejudicial to no one. This was surveyed, for the first time, by Joseph C. Brown, in May, 1821, and was confirmed by the act of July 4, 1836.

5th. J. B. Martigny. This claim was 12 arpens in front, and founded on a concession from Lieutenant-governor Cruzat in 1783, and confirmed by act of Congress of July 4, 1836.

6th. The claim of Sophia Bolaye, *alias* Boli, was filed with the recorder of land titles in 1812. It was founded on a petition to Lieutenant-governor Trudeau in 1796, for 150 arpens, to which the lieutenant-governor replied, by ordering the surveyor to put her in possession of the land prayed for, provided it was a part of the king's domain. This was surveyed, for the first time, in 1821, by Joseph C. Brown, and was confirmed by the act of 1836.

The plaintiff also introduced the proceedings before the board of commissioners on the claim of Eugenid Alvarez, which embraced 462 acres 12½ perches, granted by Trudeau in 1796, and confirmed in 1812, and the claim of John Colgin to 403 arpens, granted by Trudeau in 1797, with a view to show, from the papers filed in support of said claims, a recognition of the existence of a common south of the river Des Peres.

The plaintiff also proved, by one Pierre De Lor, that he was present when Soulard run the lines of the commons in 1796; that Soulard commenced at the south-west corner of the common fields of Carondelet, and run southwardly to the river Des Peres, and went no further, because of rain and high water.

The defendant gave in evidence, the instructions from the commissioner of the general land-office, dated January 20, 1841, to William Milburn, surveyor-general, enclosing an opinion of the solicitor of the treasury, and a copy of a communication from the secretary of war—from which it seemed, that the officers above named did not approve of the survey of Joseph C. Brown, and directed a survey to be made, so as to give the 6000 arpens claimed by the inhabitants of

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Carondelet, but without interfering with private claims, or the 1700 acres reserved by government for the barracks.

The defendant also gave in evidence the plat and field notes of the claim of Gabriel Cerre, under which he held, and which was confirmed by act of Congress of 4th July, 1836.

The court instructed the jury, at the instance of the plaintiff, that "The act of Congress, approved June 13, 1812, entitled, 'An act making further provisions for settling the claims to land in the territory of Missouri,' and the act of Congress, approved 27th January, 1831, entitled, 'An act further supplemental to an act, entitled; 'An act making further provisions for settling the claims to land in the territory of Missouri,' passed 13th June, 1812, confirmed to the inhabitants of the village of Carondelet, *alias* Vide Poche, all the land lying south of the common fields of Carondelet and the village of Carondelet, and between the Mississippi river and a line run from the south-west corner of said common fields, south 28° west, and extended same course one hundred and fifty arpens, saving and excepting therefrom all claims, theretofore confirmed by the board of commissioners, for adjusting and settling claims to land in the territory of Missouri, and all complete grants within the same limits, made by the French or Spanish governments, while those governments respectively had possession of this country, and such confirmation takes effect from the approval of said acts of Congress."

Other instructions were given, but the above appears to embrace the point upon which this controversy mainly depends.

It was conceded, that the claims to commons, made by the village of Carondelet, as well as the other villages enumerated in the act of 13th June, 1812, were confirmed by that act; but in this case it is contended, that the claim was indefinite, not set forth by metes and bounds, and consequently, until some further action on the part of the government, no particular tract can be claimed, by virtue of the act, upon which the inhabitants can maintain ejectment. The whole question, then, resolves itself into this: was there a claim to a specific quantity of land, by metes and bounds, brought to the knowledge of the federal government or its officers, before the passage of the act of 13th June, 1812, and upon which that act could operate?

In the case of *Bird vs. Montgomery*, (6 Mo. Rep., 510,) and *Mackay's Heirs vs. Dillon*, (7 *Ibid.*, 8,) in which the titles to the St. Charles and St. Louis commons, under the act of Congress above named, were investigated and passed upon by this Court. The principles upon which that act must be construed were considered and decided. It was the design of Congress, according to the construction there given to this act, to confirm the *claims* of these villages, as they were presented to, and acted on, by the board of commissioners of land claims in Upper Louisiana, without reference to the merits or demerits of the original Spanish title.

In this view of the subject, it cannot be material to inquire into the character of the concession by Trudeau, in 1796.

Whether the expressions of the lieutenant-governor, in declaring that land

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within certain limits could not be granted to individuals, because it had been reserved for the supply of the necessary wood to the village, are to be regarded only as indications of a design, at some future time, to make a definite grant, or whether the answer to Gamache must be viewed as a grant to the extent therein specified, so far as the lieutenant-governor had the power to grant, might have been material questions in an inquiry into the validity and extent of this concession, under the laws and usages of the Spanish government. The act of 1812 precludes all such investigations; it relinquishes the title of the United States to such commons as were claimed, without reference to the strength of the claim, which might have been set up under the Spanish authorities.

The report of the board of commissioners was sent to Washington, early in the winter of 1812, and it was accompanied by two official letters from one of the commissioners, addressed to the secretary of the treasury, and a letter from the secretary of the board, (T. F. Riddick) addressed to the chairman of the committee on public lands. These letters are published in the *American State Papers*, vol. 2, pages 377, 8, 9. (Duff Green's edition.) The claims of villages to their commons are placed by Mr. Penrose, (the commissioner referred to) in his communication to Mr. Gallatin, dated March 20th, 1812, in the ninth class, and in relation thereto he says, "The ninth class ought to be confirmed; they would have been under every practice we have seen. Had the Spanish government continued the possession, usage and custom, according to our construction, could not have existed in that country." In his letter of the 24th of March, he classes claims to commons under the fifth class, and in relation to the five classes, he says—"As I presume the intention of our government must be, to do such justice to their newly-acquired citizens as would have been by that government of whom they were purchased, there can be no hesitation in confirming or granting such claims as are comprehended in the five foregoing classes." In a communication by T. F. Riddick, secretary of the board, dated March 26th, 1812, and addressed to the chairman of the committee on public lands, Mr. Riddick classes the claims to commons, common fields and lands adjacent, in the 49th class, and says, in relation to that class—"The 49th class will comprise nearly one-fourth in number of all the claims in the territory of Louisiana, and, if confirmed at once by the outer lines of a survey, to be made by the principal deputy, would give general satisfaction, and save the United States a deal of useless investigation into subjects that are merely matters of individual dispute. The United States can claim no right over the same, except a few solitary village lots, and inconsiderable vacant spots, of little value, which might be given to the inhabitants for the support of schools." *American State Papers*, vol. 2, p. 379.

These communications, whilst they could not be permitted to control, in anywise, the plain meaning and intent of the act, which was reported by the chairman of the committee on public lands, to whom one of them had been addressed, and which was passed into a law on the 13th day of June following, may yet be referred to, in connection with that act, as corroborating the construction which its language bears, and which was, as has been stated, placed upon it in the two cases already determined by this Court. Congress appears to

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have acted in conformity to these suggestions, and accordingly confirmed the "*rights, tilles and claims* to town or village lots, out-lots, common-field lots, and commons," belonging to the several villages enumerated in the act.

The inquiry, then, which must determine the rights of the parties to this suit, must be confined to the claim which was made by the inhabitants of Carondelet, on or before the 13th of June, 1812. What was this claim?

In 1808, this claim was notified to the recorder, as a claim for 6000 arpens, "by virtue of a concession from Don Zenon Trudeau, lieutenant-governor, dated 7th December, 1796."

This notice was accompanied by the concession, which appears to be contained in an answer of the lieutenant-governor, Trudeau, to the petition of one Gamache, for land adjoining the village common fields, for the purpose of cultivation. In this answer, the lieutenant-governor declares, that the land petitioned for could not be granted, as it was reserved for wood for the inhabitants, nor could any other concessions take place, (*avoir lien*) in the direction of a line taken from the end of the common-field lots, and running parallel to the Mississippi, one hundred and fifty arpens lower down. In addition to these papers, there was filed before the board of commissioners a plat of survey, made in the year following the date of the concession, (1797) by the Spanish surveyor, Soulard, and purporting to have been made by directions of the lieutenant-governor, at the instance of the commandant of the village, and in the presence of the villagers. This survey ascertained the western line of the commons, no further than the river Des Peres, which was distant 23 arpens $3\frac{1}{2}$ perches from the south-west corner of the common fields—but the survey purported to be made under the decree of the lieutenant-governor, dated 7th December, 1796.

There was also before the board the certificate of Soulard, made in 1806, the purport of which was, that he had been called upon to finish his survey of the commons, but, from accidental causes, it had not been done. By order of the board, it was also ascertained, from a survey made by Joseph C. Brown, that the distance from the S. W. corner of the common fields to the river Mississippi was forty-eight arpens.

Upon these documents, one of three constructions must prevail:

1st, That the commons, as surveyed by Soulard, north of the river Des Peres, and so much more taken in the direction of the line described in the decree of the lieutenant-governor, as will make the 6000 arpens claimed, must be regarded as the extent of the claim confirmed; or,

2d, That the *quantity* of 6000 arpens must be rejected as description, and the claim be considered, as embracing the whole tract contained within the line running S. 28° W., one hundred and fifty arpens from the S. W. corner of the common fields; or,

3d, The whole claim must be considered as a floating claim for 6000 arpens of land, to be subsequently located, and neither was any common north or south of the river Des Peres, distinctly and definitely claimed, and none, therefore, was by metes and bounds confirmed by the act of Congress.

The last supposed construction of this claim has not been seriously contended

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for, either in the argument of this case or in the opinions of the various officers of the federal government, which have been given adversely to this claim, and it may therefore be rejected, as without any foundation. The act of 1812 was not a donation of land, or a mere grant *de novo*. Though, by virtue of that act, the title of the United States is extinguished, it is a recognition of claims, rights and titles, previously in existence, originating under the former government, and which, from motives of sound policy, as well as good faith, this government was induced to confirm. By no fair construction of this law can it be for a moment believed, that this government intended to grant to the town of Carondelet, from motives of mere munificence, a tract of 6000 arpens, to be located wheresoever the caprice of the inhabitants, or of Congress, might suggest.

If the act operated at all, it confirmed a known and ascertained claim—a tract already designated and fixed, leaving nothing for the future action of the government or the claimants. This was clearly the design of the act; it may have failed, because of the uncertain and indefinite nature of the claim supposed to be confirmed; but this, if it be so, was not the fault of Congress, and can be no ground for imputing to them the design of donating to any of their villages a certain quantity of land, without any fixed location.

The first supposed construction of the claim may be considered in two aspects; first, as a claim limited to the tract north of the river Des Peres, and founded, therefore, entirely upon Soulard's survey, without regarding the quantity claimed or the decree of the lieutenant-governor; and secondly, as a claim to the land embraced by Soulard's survey, and so much more taken in the direction of the line, as described by Trudeau, as will be necessary to complete the 6000 arpens. This last appears to be the view entertained by the solicitor of the treasury, and sanctioned by the commissioner of the general land-office, as appears from their official opinions, given in evidence before the Court of Common Pleas, by the defendant below. The first construction seems to be the one most strongly insisted on by the counsel, who argued for the plaintiff in error. I regard both these constructions of the claim as unfounded and unwarranted.

The papers filed before the board of commissioners afford satisfactory and conclusive proof, that the claim of the inhabitants of Carondelet was not confined to the survey of Soulard.

The amount claimed seems, of itself, to exclude such a supposition. The board of commissioners ascertained the distance from the S.W. corner of the common fields, to the Mississippi, to be 48 arpens.

If the course of the river Des Peres had been parallel, or nearly so, to the southern line of the common fields, it was manifest that the land embraced in Soulard's survey would not much exceed 1100 arpens. It is to be presumed, however, that the inhabitants were aware of the general course of this stream, and must have known, that the quantity lying between that river, (the Mississippi,) the southern line of their common field and village, and the western line run by Soulard, could not much exceed 2000 arpens.

But, apart from this, the survey of Soulard does not purport to be a complete survey; it professes to be a survey of a common, granted by a decree of the

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lieutenant-governor, of the 7th December, 1796; and instead of running the western line 150 arpens, as called for by that decree, it establishes the line no further than 23 arpens $3\frac{1}{4}$ perches.

The subsequent certificate of Soulard, in 1806, confirms this construction of his survey, and it is impossible to entertain the belief, that the commissioners of the federal government, who had before them the survey and subsequent certificate of Soulard, and who investigated and rejected this claim, considered it as a claim only for so much commons as had been surveyed by Soulard.

These two supposed constructions of the claim upon which the act of 1812 operated, which have been insisted on in the argument, it is quite apparent, afford the only plausible grounds upon which the Court could be justified in disregarding this claim; for, if it be conceded, that the land surveyed by Soulard was confirmed by the act, and so much more as might be necessary to make up the quantity claimed, to be taken in a line, designated in the decree of Trudeau, it seems to be a concession of the whole claim, as surveyed by Brown.

The only uncertainty in the decree of Trudeau, is in ascertaining the direction of the line mentioned in his decree, and the point from which that line was to start.

If these two ambiguities be removed, there can be no possible difficulty in ascertaining the entire boundaries. If, then, the survey of Soulard be admitted, and regarded as confirmed, it must follow, that his survey rendered that line and starting point fixed and certain, and a complete survey of the tract confirmed would be nothing more than a continuation of this line, to the extent designated in the lieutenant-governor's decree.

This, I have no doubt, is the proper construction of the claim. Whatever uncertainty there may have been in the description of this western boundary of the commons, has been removed by the survey of the Spanish officer, made within less than a year from the date of the decree. It is no longer a proper subject of inquiry, what is a line parallel to the Mississippi, or what point is meant by the words, "*a bout des terres du dit villages*," since the point and the line were both ascertained and fixed by the proper officer of the Spanish government, under the eye of the commandant, and the construction thus placed upon the language of the decree was sanctioned by the constituted authorities, from 1797, until the transfer of Louisiana, in 1804.

The idea which appears to be entertained now, that this line may be corrected and run, in conformity to what is conceived to be the correct exposition of Trudeau's grant, so as to embrace the quantity of land claimed by the inhabitants, without interfering with the claims, either of the government or of individuals, seems to be an after thought, and rather a question of future policy, than a judicial interpretation of past legislation. Such arguments and views can have no proper influence in determining what has been already confirmed by the acts of Congress. Either the claim, granted by Trudeau, in 1796, was confirmed, or it was not. If not, it may be a suitable matter for the consideration of the federal government, how far they will now recognize this claim; but if it has been confirmed, to its

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full extent, it only remains for this Court to pronounce accordingly, without regard to the prudence or justice, or expediency of such confirmation.

An argument, in opposition to this claim, has been drawn from the fact, that six private claims lie within the limits of the supposed commons, which have all been confirmed.

A complete answer to this objection is, that it only applies to the original concession under the Spanish government. It relates exclusively to the merits of the Spanish title, and might have been urged in opposition to a confirmation of this title by Congress, but is entitled to no weight in ascertaining the true meaning and extent of the confirmation made in 1812. Congress, we may reasonably suppose, carrying out the liberal policy which had prevailed under the former government, did not look very narrowly into the merits of the claims which they confirmed. This claim, as well as the claims of St. Charles and St. Louis, had been rejected by their board of commissioners, and this rejection was, of itself, sufficient to advise them that doubts hung over their genuineness and validity. Such considerations, however, were overlooked, and, desirous of strengthening their newly acquired citizens in their attachment to this government, and of giving them proof, not only of their justice, but of their generosity, they relinquished all their title by the act of 1812, and placed them in a situation which would require them to contend only with private claimants, if any adverse claims existed.

It is, moreover, to be observed, that the Spanish authorities always made their grants upon condition that the lands petitioned for were a part of the public domain, and generally upon conditions, that they were improved within a limited time. No settlements were made without permission from the Spanish officer, and these permissions or concessions were almost a matter of course, but the claimant was not put in possession, if an adverse possession or claim previously existed, or if the land had been previously severed, in any way, from the king's domain. Of the six claims, included within the limits of the Carondelet commons, one is of American origin, and the remaining five, with one exception, originated anterior to the decree of Trudeau, in 1796. It would seem, from the decree of Trudeau, that the existence of these claims was not unknown to him; for he declares that the claims conceded, or concessions granted, (*concessions, accordees*) within the limits decreed for commons, could not take place, (*avoir lien*) or in other words, would not be perfected into grants. How can any inference be drawn from these claims, which were not confirmed by Congress, with two exceptions, until 1836, unfavorable to the confirmation of 1812?

My inference, then, from the documents filed with the board of commissioners, is, that the claim was for a specific tract of land, designated by metes and bounds; and that, upon well settled principles of law, the quantity claimed, cannot be permitted to control, when specific boundaries are fixed; that whatever ambiguity there may have been in the decree of the lieutenant-governor, in relation to the western line mentioned in that decree, was removed by the survey made by his authority in 1797, and this survey being before the board, and communicated to Congress, was sufficient to apprise Congress of the extent and boundaries of the

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lands claimed; and that the act of 13th June, 1812, confirmed the commons to the full extent claimed before the board, by virtue of the decree aforesaid.

In my opinion, therefore, the first instruction given by the Court of Common Pleas was correct, and its judgment should be affirmed.

FRELEIGH vs. THE STATE.

1. The word "*respectable*," used in the 31st section of the act of February 27, 1843, concerning "*Costs in criminal cases*," is equivalent to the phrase, "*credible disinterested*," as used in the 17th section of the fifth article of the act of March 21, 1835, concerning practice and proceedings in criminal cases, (where application is made for a change of venue in a criminal case,) and they are each synonymous with the word *competent*. Therefore, a *respectable* or *credible disinterested* witness, means, in both acts, a *competent* witness.
2. All persons who are disinterested, and not infamous, are competent witnesses, and are presumed to be competent until the contrary appears.
3. The act authorizing a change of venue in criminal cases is imperative whenever a case is made out in conformity with its requisitions, and it is not left to the discretion of the Court, when the requirements of the act are complied with, to grant or refuse the application as a mere matter of discretion.
4. The granting of continuances is a matter of discretion in the court before which the cause is tried; and although the unsound exercise of this discretion is matter of error, yet, a plain and palpable case must be made out, to authorize the interference of the Supreme Court.
5. It is not a sufficient ground for a continuance, that the witness summoned to prove a particular fact was *not in attendance*, unless it appears, from the affidavit, that the fact could not be proved by any other person whose attendance could have been procured.
6. The Court may, in its discretion, permit witnesses to be recalled and examined, at any time before the jury retire, in criminal as well as civil cases, in order to supply testimony that has been omitted by inadvertence or mistake.
7. A ticket in a lottery, which entitles the holder to *one-fourth* of the prize drawn to its numbers, although usually called a quarter of a ticket, is a *lottery ticket*, within the meaning of the act of December 19, 1842, "to abolish lotteries, and to prohibit the sale of lottery tickets in this State," and may be so described in an indictment under this act.
8. In an indictment, under the act of December 19, 1842, "to abolish lotteries, and to prohibit the sale of lottery tickets in this State," for selling a lottery ticket, contrary to the provisions of said act, it is not necessary to set out the ticket by its tenor or purport: it is sufficient to describe the ticket as a "certain lottery ticket."
9. An indictment will lie, on the above act, for the sale of a *lottery ticket*, although the statute is in the plural, prohibiting the sale of *lottery tickets*.
10. The act of December 19, 1842, "to abolish lotteries, and to prohibit the sale of lottery tickets in this State, is constitutional. Where the legislature authorize a private individual, or a corporation, to raise a sum of money by lottery, to effect an object of public concern, as a railroad, a bridge, or a canal, the statute by which the authority is created may be, at any time, repealed, without violating any constitutional provision.

APPEAL from St. Louis Criminal Court.

E. BATES, for *Appellants*.

First: The venue ought to have been changed.

The petition and affidavits are, I believe, in exact conformity to law. The only ground of refusal taken by the Criminal Court was, that *it did not appear* that the auxiliary affiants were respectable. I contend, that, as nothing appears against them, they must be presumed *respectable*: in the sense of the law, respectable means credible; and all competent witnesses are credible until successfully impeached.

Second: The cases ought to have been continued on the affidavits filed. They are ample—covering the whole ground. (See the record.)

Third: In each case, the verdict was wrong, and ought to have been set aside.

1. The charge is for *selling* a ticket, and there is no proof nor attempt to prove a consideration.

2. The ticket alleged to have been sold is not identified, so as to distinguish it from any other ticket.

3. The charge in each count is for selling a *ticket*, and the testimony is, *one quarter of a ticket*.

Our own statute makes an obvious distinction between tickets and parts of tickets.—See Rev. Code, title, “Lotteries:” and the case of *Shankland vs. Washington City* (5 Peters’ Rep., 390,) will serve to show a great practical difference between the two instruments.

Remark here, that the last act (1842) is cumulative, and does not repeal the law in the revised code. The two acts do not cover the same ground, and were not passed for the same object.

Fourth: All the counts charge the selling of a ticket *in a lottery*, and there is no testimony tending to show that there was a lottery. This I take to be conclusive: if the party had sold a ticket of a pretended lottery, he might perhaps be indicted for obtaining money by false pretences; but surely not for selling a ticket *in a lottery* which did not exist. The existence of such lottery was a material fact, and the prosecutor having alleged it, the burden of proof was on him.

Note 1.—In Freleigh’s case, he was found guilty on all three counts, when obviously there was no testimony as to but one: and the counts are not variations of the same charge, but distinct offences—sales of tickets in different lotteries, and to different persons. Also, the instruction prayed by Freleigh was lawful and right, and the instruction volunteered by the court was illegal and wrong. Also, a witness was called back and examined, against the rule laid down in *Mary vs. The State*.

Note 2.—In Manning’s case, the jury did not find all the issues. They found him guilty on the second count, and said nothing on the first, and this is equally good for a new trial, and in arrest of judgment.

Fifth: The judgment ought to have been arrested. The indictment is bad.

Freleigh vs. The State.

1. In not setting out the tenor of the ticket.

Whenever a written instrument forms a part of the gist of the charge, it must be set out verbatim.—See Archbold's Crim. Plead., 45; 2 Russell on Crimes, 359; and 2 East's Plead., 975.

2. But if the failure to set out the tenor may be excused, still, it must be so described as to be distinguished from all others of the like sort.

3. It is not affirmatively and distinctly alleged, that there was a lottery in which the sold ticket was. The existence of such lottery is an indispensable fact, and it is a general rule that indictments under statutes must state *all* the circumstances which constitute the definition of the offence in the act, so as to bring the defendant precisely within it.—1 Chitty's Crim. Law, 282, cited and approved by this Court in Comfort's case, 5 Mo. Rep., 358, and in Martin's case, *Ibid.*, 361.

4. (As to Manning's case) The verdict disposes of only one count, and so no judgment could be rendered with the other half of the indictment standing open.

5. It is a rule that hardly admits of exception, that indictments must be so drawn, that if the facts charged be true, the defendant cannot be innocent, and this Court has recognized the rule in Martin's case and in Hunter's case, 5 Mo. Rep., 360, 361.

And here it is matter of law, that New Franklin had the right to have lotteries whose tickets might be sold without any breach of law.—See the act to incorporate New Franklin, 16th January, 1833, (new edition Mo. Laws, vol. 2, p. 328.)

True, the act of February 8, 1839, p. 30, professes to modify and put conditions to the grant; and the act of December 19, 1842, professes totally to repeal it.

But those acts are illegal and void, in so far as they attempt to resume the grant of the lottery franchise.—See *Territt vs. Taylor et al.*, 9 Cranch, 43, (3 Cond. Rep., 254;) *Dartmouth College vs. Woodward*, 4 Wheat., 518, (Cond. Rep., 526.) There is also a case in 1 Sumner's Reports, strongly bearing on same point, but I have not the book; the case is largely quoted in a late number of the Western Law Journal.

Note.—The Criminal Court of St. Louis has adjudged that the Hospital lottery is legal.

Sixth: The penal act of 1842 makes it criminal to sell lottery tickets—in the plural; so, if the party sell only a single ticket, he can only be punished under the law of 1835, and that exempts all lotteries theretofore authorized.

The courts of England have recognized this objection in their interpretation of the act 14 Geo. II., c. 6.—See Archbold's Crim. Plead., 51, 52; 1 Blackstone's Commentaries, 88.

NAPTON, J., *delivered the opinion of the Court.*

The plaintiff in error was indicted at the May term, 1843, of the Saint Louis Criminal Court, for vending a lottery ticket in the New Franklin Railroad Lottery. The indictment contained three counts: the first count charged, that the defendant "did unlawfully sell to one Charles D. Gillespie a certain lottery ticket, in a certain lottery not authorized by the laws of this State, called the

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Franklin Railroad Lottery, (which said lottery ticket was then and there taken and kept by the said Gillespie, so that the jurors aforesaid cannot set forth the tenor or substance thereof,) contrary to the form of the statute," &c. The second and third counts differ only from the first in describing the lottery as the New Franklin Railroad lottery, and charging that the ticket was sold to a person to the jurors unknown.

Upon the application of the defendant, the case was continued until the July term; at which time the defendant applied for a change of venue, making the affidavit required by the statute in such cases, accompanied by two other affidavits, in which the affiants stated their belief of the truth of all the matters sworn to by the defendant. The Court examined the two compurgators of the defendant upon their *voir dire*, touching their means of knowledge, and the grounds on which they rested their belief, as sworn to in their affidavits, and refused to award the change of venue prayed for, because it did not appear that the said affiants were respectable persons, as required by law.

When the cause was called for trial, on a subsequent day of the same term, the defendant applied for a continuance, supporting his motion by an affidavit. This affidavit states, in substance, that the witness, on account of whose absence a postponement of the trial was desired, was material; that there was no other witness in attendance by whom the defendant could prove the same facts; that the residence of the witness is New Franklin, in Howard county, but that since the last term of this Court the witness had been absent in the South; that affiant had written to New Orleans, where he learned the witness had gone, for the purpose of taking his deposition, but had as yet received no answer. The affidavit contains the other statements usual in such cases, in relation to diligence; his expectation of procuring the deposition or attendance of the witness by the next term; and the absence of all improper motives, on the part of the affiant, in making the application. The affidavit also details the testimony which he expects the witness to give. The facts proposed to be proved are, that the witness is a member of the board of trustees of the town of New Franklin; that the board, having authority so to do, entered into a contract with one W. T. Phillips, conveying, for sufficient consideration, to said Phillips, the lottery privilege secured by the act of Assembly of this State, approved 16th January, 1833, and constituting the said Phillips attorney in fact, with full power to manage or sell the lottery privilege so granted; that said Phillips, on the 27th February, 1841, for valuable consideration, transferred to Granville B. Marshall and Joseph B. Smith said privilege, and that the sum of fifteen thousand dollars has not been realized from the sale of tickets in said lottery.

The motion for a continuance was overruled, upon the trial; a witness proved that he had purchased a quarter ticket from the defendant, in St. Louis, in the New Franklin Railroad Lottery; that the ticket read thus: "This ticket will entitle the holder to one quarter of such prize as may be drawn to its number," &c. After the witness had left the stand, and after the defendant's attorney had closed his remarks to the jury, to obviate some objections made by the defendant's counsel, the witness, at the instance of the circuit attorney, was recalled,

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and testified, that his name was Charles D. Gillespie. The defendant offered no testimony, but asked the court to instruct the jury, that if they believed, from the evidence, that the defendant sold a quarter ticket, not a full ticket, as charged in the indictment, they must find for the defendant. The court refused this instruction, but gave other instructions, upon which no question is raised. The jury found the defendant guilty, and assessed his punishment at six months' imprisonment, in the county jail, and a fine of one thousand dollars.

The defendant moved for a new trial, for various reasons, which, as they are all relied on, in the assignment of errors, it is unnecessary to detail here. A motion was also made, in arrest of judgment. Both motions were overruled, and exceptions duly taken to the several opinions of the court during the progress of the cause.

The principal objections to the validity of the proceedings in the Criminal Court, may be embraced under the following heads:

First: The action of the court is held erroneous, in refusing to change the venue:

Second: In refusing the continuance asked for.

Third: In permitting a witness to be recalled, after the case was submitted to the jury.

Fourth: In refusing a new trial; and,

Lastly, In refusing to arrest the judgment.

The first error assigned is, the refusal of the court to grant a change of venue. The affidavits of the defendant and his compurgators conform literally to the requisitions of the statute; but it appears, from the bill of exceptions, that the witnesses who swore to their belief of the facts relied on by the defendant in his affidavit, were examined by the court, "touching their means of knowledge, and the grounds of their belief;" and though it does not appear, that the action of the court was affected by anything elicited in this investigation, yet the court, it is stated, refused to change the venue, on the ground, that *it did not appear* that the affiants were *respectable*, as required by law. If the term, "*respectable*," is to be understood in its ordinary acceptation, it is obvious, that the granting a change of venue must be, in all cases, to which the statute applies, purely a matter of discretion of the court. The phrase is one unknown to the law, and it must be in the breast of every judge, who is called upon to give it a construction, to fix the criterion of respectability, by which his action will be governed. Nothing could be more uncertain and fluctuating than such a standard; and with this interpretation of the law, a change of venue could never be obtained, however exactly and literally the applicant might comply with the terms of the statute, unless the judge, in his discretion, should think proper to grant it. As the law stood in 1835, (Rev. Code, p. 478,) the truth of the allegations contained in the petition were required to be supported by the affidavit of some "*credible disinterested person*." The act of February 9th, 1843, requires "*two respectable witnesses*." The term "*respectable*," used in this last act, we understand to be equivalent to the phrase, "*credible disinterested*," as used in the act of 1835, and they are each synonymous with the word, "*competent*." To this last epithet, the law has affixed

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a definite idea, and a respectable or disinterested witness, means a competent witness. Thus, the Statute of Frauds (29 Chas. II., c. 3, § 5,) requires a devise to be attested, and subscribed by three or four credible witnesses; and it has been always held, that the word credible, as used in this statute, means competent. Lord Cambden said, in *Doe dem. Hindson vs. Kersey*, (reported in 1 Day's Ca. in Err., 41,) "I understand the word credible to mean *worthy of credit*; when applied to the person of a witness, it bespeaks him to be a person of *capacity* to deserve credit: I say, of *capacity* to deserve credit, because no man can be sure of obtaining credit, let him be ever so credible."

All persons who are disinterested, and not infamous, are competent witnesses; and all are presumed to be competent, until the contrary appears. We understand, then, the act authorizing a change of venue to be imperative, whenever a case is made out in conformity to its requisitions, and that it is not left to the courts, when the requirements of the act are complied with, to grant or refuse the application, as a mere matter of discretion.

The next question presented by the record relates to the continuance. It is alleged, that a complete case is made out, by the affidavit of the defendant, and that the Criminal Court should have granted the continuance.

The granting of continuances is a matter of discretion in the court before which the case is tried; and though this Court has uniformly maintained the doctrine, that the unsound exercise of this discretion is a matter of error, it is equally well settled, that to authorize the interference of the appellate court, a plain and palpable case must be made out.

In this case, there had been one continuance, on the application of the defendant, and a second continuance was asked. The ground for delay was, the absence of a material witness. It will be seen, by reference to the affidavit, which sets forth the facts upon which the continuance is demanded, that the absent witness was expected to prove, that he was a member of the board of trustees of the town of New Franklin; that this corporation had made a contract with one W. T. Phillips, and by that contract constituted him an attorney in fact, with power to dispose of the lottery privilege granted to the corporation, by the acts of 1833 and 1835; that said Phillips had sold this privilege to certain persons named, and that the sum of fifteen thousand dollars had not been realized from the contract. It would seem, from the character of this testimony, that any other member of the board of trustees could have proved these facts, as easily as the absent witness; and we accordingly find, upon an examination of the language of the affidavit, that the defendant does not state, that the fact could not be proved by any other person whose attendance could have been procured, but that there was no other witness *in attendance* by whom he could establish these facts. Why was not a subpoena issued to some other member of this corporation? or, if the knowledge of this witness's absence was not ascertained until since the preceding continuance of the cause, (as alleged in the affidavit) why was no subpoena issued to this witness previous to that time? It appears, that a continuance for cause had been obtained at the preceding term. Whether that continuance was obtained in consequence of the absence of this same witness, does not directly appear; but it is inferrible, from the affidavit

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upon which the application for the second continuance is based, that the first continuance was granted for some other cause. Why, then, was no effort made, previous to the time set for trial, to procure the attendance of this important and, it seems, only witness, or, at least, to have his deposition taken?

Another objection taken to the proceedings of the Criminal Court, is grounded on the action of that court, in permitting the circuit attorney to recall a witness, after the counsel for the defendant had closed his speech to the jury; and the case of *Mary vs. The State* (5 Mo. Rep.) is cited as an authority, condemnatory of the course of the Criminal Court in this particular. In that case, it appears, that an agreement was made between the counsel, upon the eve of an adjournment, that the jury might disperse until morning, on condition that the defendant should not examine any more witnesses, or re-examine those who had been examined. This was a capital case; and upon this ground, connected with the express agreement of the parties, the opinion of the Court, in that case, may safely rest. In the case of *Rucker vs. Eddings*, (6 Mo. Rep., p. —,) this Court said: "The law has entrusted courts with a discretion, in allowing the parties to a cause to obviate the effects of inadvertence, by the introduction of testimony out of its order. This discretion is to be exercised in furtherance of justice, and in a manner so as not to encourage the tampering with witnesses, to induce them to prop a cause whose weakness has been exposed. Where mere formal proof has been omitted, courts have allowed witnesses to be recalled, or documents to be produced, at any time before the jury retire, in order to supply it. So, material testimony ought not to be rejected, because offered after the evidence has closed on both sides, unless it has been kept back by trick, and the opposite party would be deceived, or injuriously affected by it. So, after a witness has been examined and cross-examined, the court may, in its discretion, permit either party to examine him again, even as to new matter, at any time during the trial." The same doctrine was reiterated in *Brown vs. Burris*, (8 Mo. Rep., p. 30,) and no reason occurs, why the rule should not be held applicable to criminal cases. The testimony given, in the present instance, was merely formal, and it is not seen how it could have injuriously affected the defendant.

In relation to the refusal of the court to grant a new trial, many of the points raised on this head will be passed over. As the judgment of the court must be reversed, on account of its refusal to grant a change of venue, it will be only necessary to notice such questions the decision of which may be important in another trial of this case.

The principal point made, in this branch of the case, is, whether proof of the sale of a quarter ticket will sustain the indictment, which charges, that the defendant sold a ticket. The ticket proved to be sold, read—"The holder of this ticket will be entitled to one-fourth of the prize drawn to its number." This was physically a ticket—not a part of a ticket. That its holder was entitled, if among the fortunate, to only one-fourth of the prize drawn by its corresponding number, does not make it less a ticket. It was complete in itself, and so purports to be. It is denominated on its face a ticket, though it appeared that the holder was only

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entitled to a certain portion of the prize drawn to its number. The instruction, therefore, asked of the court on this subject, was properly refused.

The only point remaining to be considered is, the sufficiency of the indictment: to this, several objections are made.

1. It is contended that the lottery ticket should have been set out, either by its tenor or purport. It is attempted to be brought within the principle prevailing in indictments for forgery, for libel and for sending threatening letters. In these instances, it is well established, that the instrument itself must be set out. In the case of forgery, the instrument alleged to be forged must be set out, in order that the court may see whether it be such an instrument, the simulation of which would constitute the crime of forgery. In an indictment for sending threatening letters, the purport or tenor of the letter must be given, that the court may see whether it be of the character and description which comes within the prohibition of the statute, or such as the common law would punish. (Archbold's Crim. Plead., 46.) The rule, however, does not prevail in larceny, because the reason of the rule does not apply. In indictments for larceny, for example, of a bank note, it is only necessary that the instrument be described as a specific thing, showing it to be the subject of larceny. (Archbold, 46.) So, in this case, the offence is created by statute, and the description of the thing, the sale of which is prohibited, is in the very language of the act. The precedents, to which we have been referred by the circuit attorney, of the forms of indictments, under a similar statute, in Massachusetts, furnish an authority on this point, corroborated by the decision of the Massachusetts court, in the case of *Commonwealth vs. Clapp*, 5 Pick. Rep.; Davis' Precedents, 162; Rev. Code, Mass., c. 132, sec. 4.

2. It is also insisted, that, as the statutes prohibit the sale of lottery tickets, an indictment will not lie for selling a single ticket. To sustain this objection, the decisions in England, on the statute of 14 Geo. II., c. 6, which makes it felony, without benefit of clergy, to steal any cow, ox, heifer, &c., are cited. It was held, under that statute, that where the indictment charged the defendant with stealing a cow, and the evidence proved it to be a heifer, the variance was fatal, because the use of both words in the statute proved that the legislature did not consider them synonymous. Several adjudications of a similar character have been made in England, and the courts of that country, *in favorem vitæ*, have countenanced some very nice distinctions. Admitting that our courts would be willing to adopt such refinements, in cases of misdemeanors, it is not perceived that this case falls within the class of cases to which we have alluded. Had the penalties of the British statute been directed against stealing cows, heifers, &c., and had it been adjudged that, under such a law, the stealing of one cow, or one heifer, was not an offence within its meaning, the precedent would have been apposite.

3. The last and principal objection to this indictment is, that the act of Assembly, of December 19, 1842, under which it is drawn, is unconstitutional. By the act of January 16, 1833, incorporating the town of New Franklin, among other powers vested in the board of trustees of said town, was the power, "to raise, by lottery, a sum of money, not exceeding fifteen thousand dollars, for the construc-

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tion of a railroad, from the bank of the Missouri, to the town of New Franklin, aforesaid." By the 6th section of the act of February 26, 1835, the board of trustees of the said town were authorized to contract with any person to have said lottery drawn, in any part of the United States, on such terms as they might consider most advantageous, and were confirmed by the same privileges before enjoyed, as to the sale of tickets in this State, "*until the amount authorized in said act was raised.*" The act of December 19, 1842, repeals all laws authorizing the drawing of any lottery, and declares it shall not be lawful for any person or corporation, under any pretence whatsoever, to sell, exchange, or in any manner dispose of any lottery tickets, in any lottery, in this or any other State, territory or country; and imposes a heavy penalty on the offender.

We do not perceive any grounds upon which this act, standing by itself, or taken in connection with the two acts which preceded it, can be declared unconstitutional. In 1833, an act is passed, authorizing the corporation of New Franklin to raise fifteen thousand dollars, by selling lottery tickets. Ten years after the passage of this act, another law is passed, prohibiting the sale of lottery tickets within the State. Assuming, that the legislature could not resume the powers granted to the New Franklin corporation, until the franchise expired by its own limitation, yet, whether that power has ceased, according to the terms of the grant or not, depends on the matter *in pais*, about which there is no proof on this record. The general power of the legislature to pass such an act as the act of 1842, cannot be questioned; and if, in consequence of previous legislation, contracts have been made, and rights vested under these contracts, thereby claiming an exemption to the extent of such rights, from the operation of the act, such a state of facts must be shown. In courtesy to the legislature, the courts would hardly *presume* their acts to be violatory of the obligation of contracts: what proof is there on this record, which forbids the conclusion, that the sum of fifteen thousand dollars has been raised by the sale of the New Franklin Railroad Lottery tickets? or what proof is there, that this corporation has taken any steps to prevent the legislature from resuming this privilege, even before the sum has been raised, which was designated in their charter? If the legislature authorize a private individual, or a corporation, to raise a sum of money, by lottery, to effect an object of public concern, as a railroad, a bridge, or a canal, will it be contended, that the legislature may not, at any time, repeal the statute by which the authority is created? Such a course of legislation may be impolitic—it may be inequitable, but it is not therefore void. We are not aware of any cases in which the right of the legislature to repeal such laws has been questioned.

No case has gone further than to assert the principle, that where the legislature have passed a law, which amounts to a contract, in which individuals have a vested interest, the rights acquired, under such law, cannot be taken away, or impaired by subsequent legislation. An examination of this doctrine is not required by anything upon this record, and no opinion relative to this question is intended to be expressed.

The judgment of the Criminal Court is reversed, and the cause remanded.

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AARON MANNING *vs.* THE STATE OF MISSOURI.

ERROR to St. Louis Criminal Court.

Per Curiam.—This case is not materially different from the case of Freleigh *vs.* The State, and the same disposition is made of it.

Judgment reversed, and cause remanded.

ROBERTSON *vs.* CAMPBELL.

The Court, upon a review of this case, adhere to the former decision made therein, (*ante*, p. 365,) viz., That a mortgagee of personal property is, after the day of redemption, regarded in law as the absolute owner, and may dispose of the property by sale thereof, or otherwise.

ERROR to Cole Circuit Court.

HAYDEN and MINOR, for Plaintiff in Error.

1st. The Circuit Court, upon the trial of the cause, was bound to give judgment for Robertson, upon the facts of the case, as agreed between the parties, under the law of the case, as decided by this Court at its last term, and the said Circuit Court hath neither given or shown any good reason, excuse or justification, in *its* opinion filed in the cause, for overruling the said decision of this Court.

2d. That the sale, by Morris, of the negro in controversy, to the plaintiff, Robertson, invested the plaintiff with a legal right to the slave, and that it was not necessary, by the law of the land, that the sale to Robertson should have been a judicial sale, after a foreclosure of the equity of redemption of Campbell in the property, in order to have invested him (Robertson) with the right of property in the slave.—4 Kent's Com., 138; 12 Wendell, 61; 8 Johnson, 96; Story's Equity, 348; 2 Atkins, 317; 2 Johns. C. Rep., 99; 1 P. Williams, 261; 7 Cowan, 294; 7 Mo. Rep., 556; 6 Mo. Rep., 273; 1 Call. Rep., 280; 2 Call. Rep., 421.

KIRTLEY, for Defendant in Error.

NAPTON, J., delivered the opinion of the Court.

This was an action of trover, brought by the assignee, a mortgaged slave, to recover possession of the slave from the mortgagor.

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The case was decided by this Court at the January term, 1844, (vol. 8, p. 366,) and the Circuit Court, to which the cause was remanded, has dissented from the opinion there delivered, in a spirit of candor and respect, calculated to induce a careful re-examination of our position with the same feelings.

The opinion of the circuit judge is founded upon the doctrine, generally maintained in relation to mortgages of real estate, that the debt is the principal, and the mortgage only the incident; that an assignment of the debt will carry with it the mortgage, as its incident, but that an assignment of the interest in the land, without the debt, is a nullity. (*Wilson vs. Troup*, 2 Cow. Rep., 195; 5 Cow., 202; 4 Johns. Rep., 43.) If these principles be applicable to mortgages of personal property, the position of the Circuit Court is maintained.

But the same court which has held these doctrines, has also adjudged, that a mortgagee of personal property, when payment is not made on the day, is the absolute owner; (*Ackley vs. Finch*, 7 Cow., 290; *Langdon vs. Bush*, 9 Wend., 80; *Brown vs. Bement*, 8 Johns. Rep., 96;) and that personal property may, after forfeiture, be levied on, by virtue of an execution against the mortgagee, although in the hands of the mortgagor. (*Ferguson vs. Lee*, 9 Wend., 258.)

In New York, where these opinions prevail, the courts have manifested a strong inclination to break down the distinction which formerly obtained between the mode of regarding mortgages in courts of law and in courts of equity, and the legislature has evinced a corresponding disposition on their part. Hence the legislature has enacted, (what I think had been previously sanctioned by the courts,) that the mortgagor may maintain ejectment, (*Runyan vs. Mersereau*, 11 Johns. Rep., 534,) and that the equity of redemption may be sold under execution; and in accordance with this notion, that the mortgage is but a security—the mortgagor is the real owner of the estate—the *freeholder*, the courts have held, that the lands mortgaged cannot be sold on execution against the mortgaged, before foreclosure, though the estate has become absolute at law. (4 Johns. Rep., 41; 11 Johns. Rep., 534.)

Not so, however, in relation to mortgages of personal property; on the contrary, the equity doctrines in that State seem to allow the mortgagee to foreclose the equity of redemption, in personal chattels, by a notice and sale. (*Hart vs. Teneyck*, 2 Johns. Ch. Rep., 100.) But ~~this~~ was the doctrine of a court of equity, and placed upon the authority of the English cases of *Tucker vs. Wilson*, (1 P. Wms., 161,) and *Lockwood vs. Eure*, (2 Atk., 303,) and had no reference to the position of the courts of law in relation to the legal estate of the mortgagee. There is no pretension that the interest of the mortgagor in real estate could be foreclosed by such a process.

So, whilst this Court has held, that an equity of redemption in real estate was vendible, under execution, it has also held, that the interest of the mortgagor in chattels could not be sold under execution.—*King vs. Bailey*, 8 Mo. Rep.

Hence, it is evident, that there are material and numerous distinctions between mortgages of land and mortgages of chattels; and whilst the courts of law have gradually approximated to courts of equity, in their view of mortgages in real estate, they maintain their ancient ground in relation to the latter class of securi-

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ties: for this, doubtless, there have been sufficient motives, arising partly from the inferior value and importance of personal property, and partly from a reluctance to impose any unnecessary restrictions upon its transfer.

This is an action of trover, and the only question is, as to the legal title.

Unquestionably, the mortgagee, after forfeiture, has the legal title—is, in the eye of the law, the absolute owner of the chattel. It is difficult to conceive of a title of this character, accompanied with such restrictions as to prevent its transfer to another. How can a man be said to be the absolute owner of a chattel, and yet unable to make any valid disposition of that chattel, by sale, gift or otherwise?

It is suggested, in the opinion of the circuit judge, that considerable embarrassment will attend the settlement of the rights of these parties in a court of equity, if a transfer of the mortgaged property be allowed. This may be so, if a restitution of the mortgaged property is thought to be essential. But if the mortgagor be entitled to a decree only for the value of the mortgaged property, (as against the mortgagee) deducting the amount of the debt, it is not perceived, that the sale, by the mortgagee, will anywise affect the rights of the mortgagor in equity.

Judgment reversed, and cause remanded.

CAWTHORN vs. MULDROW.

The judgment of the Circuit Court will not be reversed for giving erroneous instructions, where the evidence is not preserved in a bill of exceptions.

APPEAL from Audrain Circuit Court.

HICKMAN, for Appellant.

1st. The Circuit Court erred, in giving the instruction asked by attorney for Muldrow, and in refusing to give the instructions asked by attorney for Cawthorn.—Rev. Stat., p. 86, sec. 14.

2d. After an attachment is dissolved, or a verdict found for defendant, the proceedings are vacated, and an appeal does not reinstate the same.—13 Johnson, 139.

3d. After an attachment is dissolved, or verdict for defendant, the officer who has possession of the property, by surrendering the same to the defendant in attachment, (without waiting ten days, to see if the plaintiff appeals,) does not render himself liable for the property so surrendered.—See 1 Mon., 153.

No evidence offered to the jury was preserved by the bill of exceptions, but it is not necessary, in the disposition of the question now presented.—See *Hughes vs. Ellison*, 5 Mo. Rep., 110; 1 Dana, *Robards vs. Wolfe*, 155.

Cawthorn vs. Muldrow.

KIRTLEY, for Appellee.

This was an action, instituted before a justice of the peace, on an account, with an attachment. The case went to the Circuit Court by appeal, and on the trial in the Circuit Court, it seems, from the record, that instructions were asked by both the plaintiff and defendant, which are preserved by bills of exceptions, but the attorney for the plaintiff has wholly forgotten to preserve any of the evidence on which said instructions were predicated. This, I suppose, puts an end to any inquiry here, into the correctness or incorrectness of the decisions of the Circuit Court, and its judgment will be affirmed.

TOMPKINS, J., delivered the opinion of the Court.

This is an action commenced by George F. Muldrow, before a justice of the peace, in Audrain county, against Alfred Cawthorn. The account filed, and on which the suit was brought, is for money due to the State of Missouri, for the use of Muldrow, on Cawthorn's official bond. These are the particulars:

"For suffering property to escape, when levied on by attachment.....	\$29 53
"Costs in said suit.....	20 98."

Muldrow obtained a judgment before the justice, and Cawthorn appeals to the Circuit Court. In that court, Muldrow again had a judgment; and from that judgment of the Circuit Court, Cawthorn appealed to this Court. Each party prayed the Circuit Court to give instructions to the jury, some of which were given, and others refused. Cawthorn moved for a new trial, on the ground that the Circuit Court erred, in giving the instructions asked by Muldrow, and in refusing to give those asked by Cawthorn. Mr. Hickman, for Cawthorn, admits, that "No evidence offered to the jury was preserved by bill of exceptions;" and he contends, that it is not necessary in the disposition of the questions presented by him, and he relies on the authority of the case of *Hughes vs. Ellison*, 5 Mo. Rep., 110, and *Robards vs. Wolfe*, 1 Dana, 155.

In the latter case, the action was founded on an injunction bond. Issue was taken upon the plea of *non est factum*: upon the trial of this issue, the Court instructed the jury, that the bond sued on being official, its attestation was *prima facie* evidence of its due execution by the defendant, Robards. The propriety of this instruction was the only question. It was contended, that the judgment ought not to be reversed, because the bill of exceptions did not state the evidence upon which the court predicated the instruction. The court say that instruction could not be sustained, under any imaginable proof. The report of the case shows that the bond was sued on: it must have been produced in evidence, to show its attestation: all this appearing on the record proper, it was not necessary, for the information of the court, that it should be preserved in the bill of exceptions. The late Judge McGirk, delivering the opinion of the court, in the above cited case of *Hughes vs. Ellison*, says, "The next point made is, that the court instructed the jury to find for the defendant. This instruction, according to the opinion of

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the court in the case of *Sibley vs. Hood*, took the whole case from the jury. It is said here, that what was done amounted to a demurrer to the evidence. If it should be so considered, which I do not agree to, yet, owing to the defect in the bill of exceptions, in not stating what the whole evidence was, we cannot know how the matter should have been decided." In a previous part of this opinion, it had been stated, that the bill of exceptions did not show that all the testimony was preserved. It is in vain, then, to appeal to those two cases to sustain the position, that the judgment of the Circuit Court may be reversed for error committed in giving instructions where no evidence is preserved in the bill of exceptions; for, in the case cited from *Dana*, it appears on record that a bond was given in evidence, and that is preserved without the aid of a bill of exceptions; and in the case of *Hughes vs. Ellison*, it is said, that all the evidence was not preserved. If no evidence had been preserved, it would have been so stated. The only principle decided in this case is, the Court cannot usurp the rights of the jury.

The judgment of the Circuit Court is affirmed.

PALMER vs. CRANE.

1. Where, in a suit by attachment, the sheriff makes a false return, by which the plaintiff is prevented from obtaining a judgment, he may proceed immediately against the sheriff, without further prosecution of his attachment.
2. A writ of error will not lie on the judgment of the court overruling a demurrer. A final judgment on the demurrer must also be rendered.

ERROR to Montgomery Circuit Court.

CAVE, Attorney for Plaintiff in Error.

The court erred in overruling the plaintiff's demurrer to second and third pleas, because the plaintiff's declaration is good in form and substance, and the defendant's second and third pleas are bad.

2d. The court erred in giving judgment against the plaintiff for costs.

1st point, as to overruling plaintiff's demurrer, see the following authorities, to show that all the concatenating circumstances are alleged to make a good declaration in that form of action.—See 2 Chitty, 738, and note (F); *Ibid.*, 740; *Ibid.*, 253, note (q); 1 Chitty, 417, and 265, note (q), on same point.

2d, as to judgment in case, 2 Chitty, 738, and note (F); *Ibid.*, 417, and 265, note (q).

3d. The vagueness of sheriff's return should not be construed in his favor, when we have met it, and alleged it to be false. As to allegation of false return,

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see 2 Chitty, 740; 2 Phillips' Ev., 394, 5: a general allegation sufficient, but we have particularized what part of return is false.

Having shown the declaration to be, at least, substantially good, we proceed to examine the two pleas demurred to:

1. As to the first special plea, it is bad in form and substance, being a special plea, amounting to the general issue.—See 1 Chitty, 557; *Ibid.*, 536; *Ibid.*, 165, 166.

2. The defendant's second special plea being the last plea, is bad in form and substance: first, as to form, because the judgment of the Court referred to in plea was not embodied in said plea; second, it is not certain in regard to time, which makes said plea substantially bad. See, as to certainty of plea, 1 Chitty, 571, 588.

And here we contend, if said third plea is true, that we dismissed an action against a third person, that is no purgation of the wrong done by the sheriff, and therefore it is no bar to our action: nor is it requisite for the plaintiff in the original action to go on and get judgment against the original defendants, where a false return is charged on mesne or original process, because if that be true, the sheriff prevented us from getting judgment against the original defendants.—See Attachment Law of 1839, sec. 3; *Ibid.*, 1835, sec. 6, clause 4, and sec. 17: on levy and return, see Laws, 1835, sec. 51 and 8: as to publication, and special judgment, and execution, *Ibid.*, sec. 10 and 11: as to judgment and execution, see sec. 18: as to official bond, see section 37, second and third clauses, and sec. 40 and 41: on taking bond, and selling goods, which, if done, he perhaps should show in special plea, Laws of 1835, p. 450, sec. 1: as to original writs, see Laws Attachment, 1839: defendant's right to disprove judgment in three years, see sec. 16: see 2 Phillips' Ev., what proof necessary for false return of mesne process, p. 237: *Ibid.*, 15 Johns., 267; *Ibid.*, 456; 5 *Ibid.*, 356; 7 *Ibid.*, 555; 14 *Ibid.*, 195.

Then there is no statutory prohibition as to suing a sheriff for a wrong of this description, it being a wrong at common law, and this remedy, one which will generally lie in all cases where trespass, trover, detinue, or replevin cannot be brought, &c.; which disposes of the first error assigned.

2d Error: the Circuit Court erred in giving judgment to plaintiff for costs, &c.

LEONARD and BAY, Attorneys for Defendant.

1. The second plea is good in substance; the plea may be defective as amounting to the general issue, but such defect can only be reached by a special demurrer; here the demurrer is general.—1 Chitty's Plead., 559.

2. The third plea contains a good defence to the plaintiff's action. If the plaintiff "did not prosecute his suit of attachment in the Montgomery Circuit Court with effect, but voluntarily abandoned the same," he certainly has no cause of action against the defendant in the attachment. It was necessary for the plaintiff to establish a demand against the defendant in the attachment, by the judgment of the court, before the sheriff could become liable to him for any illegal

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disposition of the property levied upon. By abandoning his suit, the plaintiff, in effect, admits, that he had no cause of action against the defendant in the attachment, and consequently none against the defendant in this suit.

3. The declaration sets forth no cause of action. The property levied upon belonged, in law, to the defendant in the attachment, until the plaintiff had established his demand, by judgment of the court, and until the property was levied upon, under a special *fiery facias*, to satisfy such judgment. It was necessary for the plaintiff to aver, that he had obtained judgment against the defendant in the attachment, and to show a failure of the sheriff to sell the property under the *fiery facias*, and apply the same to the satisfaction of the plaintiff's judgment, before he could have any cause of action against the sheriff.—See Rev. Stat. of 1835, title, "Attachments," sec. 6, 41, 51; pp. 77, 81, 82; Bartlett, 10 Mass., 477; Young vs. Hosmer, 11 *Ibid.*, 88; Rich vs. Bell, 16 *Ibid.*, 294; Mather vs. Green, 17 *Ibid.*, 61; Whitaker vs. Sumner, 9 Pick., 308.

TOMPKINS, J., delivered the opinion of the Court.

This is an action of trespass on the case, brought in the Circuit Court of Montgomery county, by Palmer, the plaintiff in error, against Cram, sheriff of said county. The declaration contains two counts. The first count states, in substance, that N. and S. Lichton, being indebted to the plaintiff by bond, he, the plaintiff, on the 19th August, 1842, sued out a writ of attachment against them, returnable to the October term of that court, then next, and that, on the following day, he delivered that writ to Cram, the defendant; and that, on the said day, the defendant levied the writ on property of the said N. and S. Lichton; and that, afterwards, the said defendant, Cram, in order to hinder the said plaintiff, Palmer, in the collection of his said debt, voluntarily sold and delivered the said property, and converted the same to his own use, the plaintiff's debt being still unpaid; and that Cram, the sheriff, afterwards, falsely returned on said writ, that he had executed it on the 20th of October, 1842, upon certain goods and chattels of said Lichton, in his return described, said goods being in the custody of the sheriff of said county, under an execution in favor of Aaron Reter, for the sum of \$3,059 75, issued from the Court of Common Pleas of St. Louis, previously levied on them, and that the defendants, Lichton, were not found in Montgomery county.

The second count states, that the sheriff levied on the goods, with intent to hinder, &c., and then made the same false return.

The defendant pleaded two pleas, viz.:

1st. That he did not sell said goods and chattels, and convert the proceeds of the same to his own use; and concludes to the country.

2d. That the plaintiff did not prosecute his suit of attachment in the Montgomery Circuit Court with effect, but voluntarily abandoned the same, and concludes with a verification. To these pleas the plaintiff demurred. His demurrers were overruled; the court gave him judgment for costs, and he, the plaintiff, proceeds by writ of error, to reverse the judgment.

1st. Was it material to the merits of this cause, whether the sheriff, defendant

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in the cause, sold the goods, and converted the proceeds of the sale to his own use? The injury complained of was, that the sheriff made a false return. He made a return, that no goods of the defendant in the attachment could be found, except some already levied on to satisfy executions, and that the defendants in the attachment were not found in his county. In neither case could he, Palmer, prosecute his suit in attachment to a judgment against the defendant: for neither goods nor chattels of the defendant being found, Palmer could not obtain a judgment in rem., there being no property attached to give the court jurisdiction in rem.; and the defendant himself not being found, jurisdiction over the person was not taken. Palmer, then, after this return of the sheriff, Cram, could not prosecute his suit against Lichton to judgment, because no property was found, by which he could be attached, and also, Lichton himself was not found. (See 4 McCord, 372. After an escape, the plaintiff may proceed immediately against the sheriff, without further prosecuting his suit against the principal; so, for a false return. The demurrers to these two pleas, then, should have been sustained, and if any judgment on the demurrers had been entered up against the plaintiff, Palmer, that judgment would now be reversed. The entry is, "That it is considered by the Court, that the said second and third pleas, &c., are good, &c., to bar and preclude the plaintiff from having and maintaining his action thereof, &c., and that the plaintiff's demurrers be overruled; and it is further considered, that the defendant recover his costs, &c., and that he have execution."

A final judgment is entered thus: "Therefore it is considered, that Palmer take nothing by his writ, &c., and that the said Cram go thereof without day, &c. (1 Saunders, 198.) The writ of error having been improvidently issued, when no final judgment had been rendered, there is no cause judicially before the Court, and the writ of error must be dismissed."

OVERTON ET AL. vs. STEVENS ET AL.

1. *In Chancery*.—The bill alleged, that complainants purchased of A., as the agent of B., certain horses, for which complainants executed their two notes to B. for \$2,800 each; the first note payable on the first of January, 1840, and the second one year thereafter. At the time of the purchase A. executed to complainants a bill of sale for the horses, in which he *bound himself, as agent*, to deliver to complainants perfect pedigrees of the horses. In the bill of sale A. described himself as agent of B., but signed the bill in his own name. B. brought suit on the first note, and recovered judgment thereon. The complainants further charge, that the pedigrees were never delivered to them, by which they sustained damage to the amount of the first note, and that defendants, A. and B., were non-residents of this State, so that no process could be served upon them, and therefore prayed a perpetual injunction against the collection of the judgment.

The answer of B. admitted the sale of the horses, and the authority of A. to sell, but denied any authority in A. to bind B. to furnish pedigrees.

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Held: That the bill was properly dismissed, for want of equity. The bill of sale, signed by A., in his own name, was binding on himself alone, and the complainants did not charge that B. had, in any manner, recognized any authority on the part of A. to bind B. to furnish the pedigrees. The bill was further defective, in not making a tender to B. of the amount admitted to be due to him.

2. It is generally true, that a court of equity has no jurisdiction where a party had a complete defence at law, and failed to make it; but if the defence be of such a character that it might be made either at law or in equity, the latter court will afford relief, though the party has neglected to make his defence at law.
3. Where covenants are mutual and independent, and an action is brought thereon by one of the parties, who is a non-resident, or insolvent, such non-residence, or insolvency, may be a good ground for the interposition of a court of equity, in order to prevent irreparable injury to the other party.
4. Where one has authority, as agent or attorney, to bind another in a written instrument, and signs the instrument in his own name alone, he binds himself and no other person, although he may have described himself as agent in the body of the writing.

APPEAL from Marion Circuit Court.

HICKMAN, Attorney for Appellants.

1st. Upon the motion to dissolve the injunction, for the want of equity on the face of the bill, the Circuit Court ought not to have dismissed the bill, and given a decree against complainants for the costs.—See *Harden*, 12; 1 *Bibb*, 518; 1 *Mon.*, 190; 3 *J. J. Mar.*, 302; 6 *Cranch*, 51.

2d. The appellants contend, that the Circuit Court of Marion, sitting as a court of chancery, had undoubted jurisdiction in this cause, both defendants in the bill being non-residents of this State.—See 2 *Littell*, 72; *Ibid.*, 85; *Littell's Select Cases*, 469; *Ibid.*, 407; *Ibid.*, 244; 1 *Littell*, 305; 4 *Littell*, 157; 3 *Mon.*, 83; *Littell's Select Cases*, 26.

3d. If the appellee, Stevens, was not originally bound by the acts of Van Lear, his agent, who made to appellants the bill of sale, still, his subsequent recognition of the acts of Van Lear made him (Stevens) responsible to appellants for the pedigrees which Van Lear had bound himself to furnish.—See 3 *Marshall*, 484; 5 *Littell*, 178; 6 *Wheaton*, 240; *Paley on Agency*, 203, 302, 305, 197.

4th. Van Lear was made a defendant; an order of publication was made against him; he never answered the bill, and the Circuit Court ought not to have entered a decree for costs in his favor, against the complainants.—2 *Marshall*, 244; 3 *Ibid.*, 535.

CROCKETT and BRIGGS, for Appellees.

1st. A court of chancery had no jurisdiction of the cause; for the reason, that the complainants had a plain remedy at law. In the suit at law upon the note, the defendants could have proved damages in mitigation of the amount to be recovered.—3 *Wendell*, 236; 4 *Ibid.*, 483; 8 *Ibid.*

2d. The bill of sale in this case imposes no obligation to furnish pedigrees,

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upon Stevens. The bill of sale is not signed by Stevens, either in person, or by his agent. It is signed simply, "Isaac Van Lear," and by its express words, the promise to furnish pedigrees is made by Van Lear, and not by Stevens.—Coke's Rep., 75; Comyn's Digest, "Attorney," c. 14; Paley on Agency, 180; 2 Kent's Com., 620, 631, (3d edit.); Story on Agency, sec. 147; 8 Marshall, 545; 2 Lord Raymond, 1418; 1 Strange, 705; 2 East, 142; Bac. Ab. Cases, 1, sec. 10; 5 East, 148; 1 Wils. Rep., 28, 58; 6 John. Rep., 94; 9 John Rep., 334; 10 Wendell, 87; 4 Mass. Rep., 595; Story on Agency, sec. 153; Livermore on Agency, 253, 4; 2 Strange, 955; 5 Mass. Rep., 299; 1 Hill, 160; 20 Wend. Rep., 257; 8 Mass. Rep., 108; 12 Mass. Rep., 174; 7 Monroe's Rep., 356; 4 J. J. Marshall, 127; 2 Wheaton, 56, 7.

3d. The complainants "must do equity before they can require equity:" in other words, they cannot tie up the judgment on the first note which matures, without showing their readiness to pay the last note, which is admitted to be due, and which remains unpaid. In New York, it has been decided, that relief in equity should not be granted against a usurious contract, unless the plaintiff brings into court the money actually lent, with interest. (1 Johns. C. Rep., 367, 439.) The same principle applies with more force here. Before the complainants should be allowed to tie up one-half the purchase money, they ought to have tendered in court the remainder, which they admit to be due.

4th. Inasmuch as the complainants allege that the damage which they suffered amounted only to one-half the purchase money, they had no right to enjoin the collection of the *first* note, when it is conceded that the *last* note would cover the loss.

5th. Upon the proof, complainants are not entitled to relief, as there is no evidence that they have been damaged, as alleged in the bill; on the contrary, the evidence is satisfactory, that they have sold the horses for as much as the original cost, besides having realized large profits by running them.

NAPTON, J., *delivered the opinion of the Court.*

William G. Overton, Samuel C. Sloan and Henry Shacklett, filed their bill in chancery, in the Marion Circuit Court, at its November term, 1840, to enjoin the collection of a judgment at law, obtained against them by John C. Stevens. The bill charges, that in 1838, John C. Stevens, sent by his agent, Isaac Van Lear, to the city of St. Louis, a lot of blooded horses, four of which the complainants purchased, upon a written contract with Van Lear. That contract was as follows: "Know all men by these, that I, Isaac Van Lear, agent for John C. Stevens of the State of New York, in consideration of five thousand six hundred dollars to be paid me, by S. C. Sloan, Henry Shacklett and William G. Overton, all of the State of Missouri, in two equal instalments, as per their two notes, bearing even date with this, do hereby give, grant, bargain and sell unto the said Sloan, Shacklett and Overton, the four following horses, to wit: black horse, *African*, five years old, by imported Valentine, dam Ethelinda, by Marshal Bertrand; *Bonny Black*, mare, five years old, by imported Valentine, dam Helen Mar, by Thorn-

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ton's Rattler; *Ethiopia*, a black mare, four years old, by Darhull, dam by imported Expedition; *Mortimer*, a chesnut horse, five years old, by Monmouth Eclipse, dam by Oscar: To have and to hold the said horses unto the said Sloan, Shacklett and Overton, free of any claim or encumbrance whatever; and I, the said Van Lear, for John C. Stevens, do guaranty the above-named horses to be thorough bred, and bind myself, as agent, to deliver to the said Sloan, Shacklett and Overton, full, perfect and properly authenticated pedigrees of said horses, within a reasonable time.—Given under my hand this 18th September, 1838.

(Signed)

"ISAAC VAN LEAR."

Complainants allege, that they executed two notes, each for the sum of twenty-eight hundred dollars, payable on the 1st of January, 1840, and the 1st of January, 1841, and delivered the same to Van Lear, as agent for said John C. Stevens; that Stevens has brought suit, and recovered judgment on the first note. The complainants aver, that full and perfect pedigrees of the horses sold to them by Stevens, especially of *Mortimer* and *African*, are essential to a proper appreciation of their value by the public, and that said pedigrees had not been furnished, pursuant to contract with said Stevens, although said Stevens had fully recognized the agency of Van Lear in transacting the sale. The bill proceeds to specify sundry losses, which the complainants suppose themselves to have sustained, by not having properly authenticated pedigrees, and charges those losses to be equal to the amount of the first note, for two thousand eight hundred dollars. The bill further charges, that Stevens is a non-resident, so that no process can be served on him, and prays a perpetual injunction against the collection of the judgment at law for twenty-eight hundred dollars. Van Lear is made a party defendant.

The answer of Stevens admits the sale of the horses, and the authority of Van Lear to sell, but denies any authority in Van Lear to bind him to furnish pedigrees; avers, that the pedigrees of the horses were fully known to the complainants when they purchased; that they were published in the *Turf Register*, a paper to which they were subscribers; and denies, that complainants sustained any loss or inconvenience for want of written pedigree; avers, that the horses were sold by complainants at a profit, after realizing handsome sums by running them.

Van Lear never answered the bill, and no notice was taken of him in the order of publication.

At the November term, 1843, defendant filed two motions—first, to dissolve the injunction granted by the County Court on the bill, answers and depositions; and, second, to dissolve the injunction, for want of equity on the face of the bill. From the bill of exceptions, it appears, that the injunction was dissolved, and the bill dismissed, for want of equity on its face.

The only question, then, presented for the consideration of this Court is, whether the bill contains any equity.

Objections to the jurisdiction of the court are not regularly made at the hearing of a cause in chancery, but if it be obvious that the court has no jurisdiction, the bill will, notwithstanding the irregularity of the proceeding, be dismissed. It is generally true, that equity has no jurisdiction, where a party had a complete defence at law, and failed to make it; but if the defence be of such a character

that it might be made either in law or equity, a court of chancery will afford relief, though the party has neglected to make his defence at law.—9 Ves., 464; 7 Ves., 19; *King vs. Baldwin*, 17 Johns. Rep., 388.

In the present case, the grounds upon which the interposition of the chancery court is sought, are not only the existence of a defence to the note, arising out of a claim for damages, occasioned by the breach of warranty, but the non-residence of the parties defendant, by which such defence is rendered unavailing to the complainants in the suit at law.

Where there are mutual engagements, entirely independent of each other, either party may sustain his action for a breach of the promise of the other, without an averment of a performance of the obligation assumed by him, and consequently his non-performance furnishes no defence to his adversary. In such cases, however, the non-residence or insolvency of the party has been considered as furnishing an auxiliary ground of jurisdiction to the courts of equity, and authorizing their interference. This principle has been frequently recognized in Kentucky, and their reports furnish abundance of authority in favor of the position taken by the appellants. The question has not arisen in this State, so far as I know, but it is most unreasonable that our courts should exercise a power of this nature, where a non-resident or insolvent creditor is pressing the collection of his demand, against which the defendant has a just offset, either liquidated or unliquidated. The defence would be inadmissible at law; and even when the defence is one arising out of a breach of warranty, and therefore, according to some authorities, admissible in the suit at law, the party may still resort to equity, the courts of law and equity having concurrent jurisdiction. But whether the practice alluded to should be adopted in this State or not, is a question not necessary to be determined now. Assuming, that the general grounds taken by the complainants are sufficient to warrant the interposition of a court of equity, there are two objections to the case, as made out in the bill, either of which is, in our opinion, conclusive.

1st. The bill of sale given by Van Lear to the complainants imposed no obligation upon Stevens. It does not purport to bind Stevens. It is true, that Van Lear describes himself as the agent of Stevens, but he signs his own name, not the name of Stevens, to the instrument, and binds only himself. (Story on Agency, sec. 148, &c.) Nor is there, in the bill, a distinct charge of any such acts on the part of Stevens, as would amount to a recognition of the agency of Van Lear. There is no averment that Stevens was ever apprised of the terms or substance of the bill of sale, as given by Van Lear, or that Stevens ever authorized any warranty of the pedigrees to be given, or recognized such warranty after it was executed by Van Lear. It is asserted, by way of recital, that Stevens had repeatedly recognized the agency of Van Lear in the transaction, and, so far as the sale is concerned, this is admitted by Stevens in his answer; but no specific acts of Stevens are charged as recognizing the warranty contained in the bill of sale.

2d. It is an excellent and invariable maxim of a court of equity, that he who asks the aid of that court must do equity himself. The complainants admit themselves to be indebted to Stevens, to the full amount of the judgment which he has obtained against them. If they pay the present judgment, it appears, from

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their own statement, they are still perfectly secure; for their claim for damages, at their own estimate, will not exceed the amount of the note, which, at the filing of the bill, was still due. If the present judgment was enjoined, it is not equally clear that Stevens would be secure, as the complainants might, in the mean time, become insolvent. To entitle them to the aid of a court of equity, they should, at all events, have proffered to pay what they admit to be due.

Judgment affirmed.

ARMSTRONG ET AL. vs. FARRAR ET AL.

1. Upon a trial, for the purpose of determining the validity of a will, where several of the devisees are made defendants, the declarations of one of the defendants as to the state of mind of the devisor, at the time of making the will, may be given in evidence against all the defendants.
2. Where the parties to a suit have a joint interest in the matter in controversy, whether as plaintiffs or defendants, an admission made by one is, in general, evidence against all.

ERROR to Franklin Circuit Court.

TRUSTON POLK, for Plaintiffs in Error.

1. The court below erred in refusing to allow the counsel of the plaintiff below to ask their witness, "whether he had ever heard John S. Farrar, one of said defendants, say anything as to the childishness or mental imbecility of the deceased, Leonard Farrar, at the time of the making the paper claimed to be his will."—1 Phil. Ev., 90, 4th American, from 7th London edit., by Cowen & Hill; *Ibid.*, (same edit.) 92; 2 Starkie's Ev., 22; Bauerman et al. vs. Radimus, 7 Term Rep., 663; Dillon vs. Chouteau, 7 Mo. Rep., 386; 2 Starkie's Ev., 25; Lucas et al. vs. De la Cour, 1 Maule and Selwyn, 249; Nichols vs. Dowding and Kemp, 1 Starkie's N. P. C., 81, (or 2 English Com. Law Rep., 305); Sangster vs. Magereddo et al., 2 English Common Law Rep., 338; Grant vs. Jackson, Peake's N. P. C., 203; Thwaites vs. Richardson, *Ibid.*, 16; Wood and Others vs. Braddick, 1 Taunton, 104; Lowe vs. Boteler and Eastburn, 4 Har. and McHen., 346; Jackson ex dem. Hoogland vs. Vail, 7 Wendell, 125; John, administrator, vs. Beardsley et al., 15 Johns. Rep., 3; King vs. Inhabitants of Hardwick, 11 East, 579; 4 Sargeant and Rawle, 203; Lightner et al. vs. Wike, 13 *Ibid.*, 328; Atkins vs. Sanger et al., 1 Pick., 192, 3.

2. The Circuit Court erred in not setting aside the verdict, and granting the plaintiffs in error a new trial.

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LEONARD and BAY, for Defendant in Error.

1. All the issues were found for the defendants, and it is therefore immaterial whether or not the evidence was sufficient to sustain the plea of the statutes of limitations.

2. The questions asked by the plaintiffs, of their witness, "whether he had ever heard John S. Farrar, one of the defendants, say anything as to the childishness or mental imbecility of the deceased, Leonard Farrar, at the time of the making of the paper claimed to be his will?" was properly excluded: because—

1st, The question before the jury was, whether the testator was of sound, disposing mind and memory; or not, at the time of making the instrument purporting to be his will? and this question is to be determined by facts and circumstances which took place at the time.

The evidence offered is of a bare opinion, or assertion which may have been expressed by one of the defendants not under oath, and perhaps entertained without any reasonable ground.—*Philips et al. vs. Hartwell et al.*, 1 Mass., 71.

2nd, The declarations or statements of one of the defendants could not be given in evidence to the prejudice of the others. There was no privity between them; their rights were distinct, and independent of each other.—*Osgood vs. Manhattan Co.*, 3 Cowan, 623.

NAPTON, Judge, delivered the opinion of the Court.

This was a petition by the plaintiffs in error, heirs at law of Leonard Farrar, deceased, contesting the will of said Farrar, and praying an issue to be made up, according to the provisions of our statute, for the purpose of determining the validity of the said supposed will. The legatees and devisees under the will were made parties defendants. The ground alleged in the petition for setting aside the will, was the incapacity of the testator at the time of making his will. Three of the defendants, John S. Farrar, Richard Farrar and Perrin Farrar, appeared and pleaded—*first*, that the testator was of sound and disposing mind; and, *second*, the bar of the statute of limitations.

The issue on each of the pleas was found for the defendants, and the plaintiffs applied for a new trial.

The will of Leonard Farrar is preserved by the bill of exceptions. The testator, after leaving some inconsiderable legacies to several of his children designated in the will, gives all his lands to his three eldest sons, John, Richard and Perrin, "to divide equally between themselves," and appoints these three sons executors of his will.

Upon the trial, the counsel for the petitioners asked a witness, "whether he had ever heard John S. Farrar, one of the defendants, say anything as to the childishness or mental imbecility of the deceased, Leonard Farrar, at the time of the making the paper claimed to be his will." This question was objected to, and excluded by the court, and exceptions were taken to the opinion of the court in excluding the offered testimony.

Entertaining the opinion which we do on this point, which is the chief one relied on as error, it is deemed unnecessary to examine the evidence given to sustain the plea of the statute of limitations, which the plaintiff in error contends was insufficient to warrant the verdict.

The rule laid down by Starkie and other elementary writers on evidence, that the admission of a party on the record is always evidence, (at least against that party) was adopted by this Court, in the case of *Dillon vs. Chouteau*. The doctrine, in its broad and unqualified sense, chiefly rests upon the cases of *Boerman vs. Radennis*, and *Crait and Wife vs. D'Aeth*, (7 Term Rep., 670.) Later authorities have limited and qualified its application; but, in departing from the inflexible rule of Lord Kenyon, the courts appear to have fallen into an irreconcilable conflict of opinion, as may be seen by reference to the cases collated by the learned editors of Phillips' Evidence.—See Phillips' Ev., p. —: Cowan & Hill, editors.

Without entering into any investigation of the numerous authorities on either side of this question, we will merely advert to what we suppose to be the true meaning and sense of the rule, that the declarations of parties may be given in evidence against them. The rule, as we suppose, is founded, first, upon the reasonable presumption, that no person will make any declaration against his interest, unless it be founded in truth; and, second, upon the fact, that the person making the declaration against his interest, being a party to the suit, cannot be examined, and therefore does not conflict with the established maxim, that the best evidence which the nature of the case admits of must be produced.

It will be found, I think, upon examination of the authorities, that, in some of the cases, the first of these principles only is relied on, and in others, the courts have looked only to the last: hence, the diversity of conclusions arrived at. The cases of *Wood vs. Braddick*, (1 Taunton, 104,) *Nichols vs. Dowding and Kemp*, (1 Starkie's Ca., 81,) and *Grant vs. Jackson*, (Peak's Ca., 203,) are instances in which the courts have disregarded the maxim of only admitting secondary evidence, where better evidence cannot be had, and looked only to the interest of the person whose declarations were allowed. In the case of *Boerman vs. Radennis*, the court considered the interest of the parties as out of the question, and declared it an inflexible rule, that the admission of a party on the record should be received in evidence, because that party could not be examined.

Without feeling under the necessity, in this case, of determining which of these conflicting adjudications should be followed, we may safely adopt the rule, that where both reasons concur, where the admission is against the interest of the person making it, and that person is a party to the record, it is evidence against the party making it, and his co-parties, where there is a joint interest or privity of design between them. The declaration of John S. Farrar, relating to any facts or circumstances calculating to show a state of mental imbecility in Leonard Farrar, at the time of making his will, if made after the death of the testator, were competent evidence against all the defendants, since they were not only parties to the record, but identical in interest.

The case of *Atkins vs. Sanger*, 1 Pick. Rep., 192, is in point. In that case,

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where several persons were both legatees and executors in a will, and also appellees in a question upon the probate of the will, the court allowed the admission of one of them, as to facts which took place at the time of making the will, showing that the testatrix was imposed upon, to be received in evidence against the validity of the will. This case does not conflict with the case of *Phelps and Others vs. Hartwell and Others*, (1 Mass. Rep., 72.) In this last case, the court rejected the evidence offered, because it was of a bare *opinion*, said to have been expressed by one of the parties; and upon that ground alone it was excluded. Judge Sedgwick, it is true, placed the exclusion on other grounds, and, so far as his opinion is concerned, it is overruled by the subsequent case of *Atkyns vs. Sanger*; but the opinion of the majority of the court is entirely consistent with the opinion in *Atkyns vs. Sanger*, and so it was declared to be in this last-mentioned case. It is clear, that confessions or admissions of a party are only evidence against him when parol evidence of the same facts would be competent, or, in other words, when, in the judgment of the law, higher and better evidence in existence cannot be produced. (*Willard Canal Company vs. Hathaway*, 8 Wendell, 486.) Hence, where the party himself can be examined, his admissions are no evidence. (*Brashear vs. Burton*, 3 Litt. Rep., 14; 3 Bibb., 9; *Moore and Porter vs. Rea*, 6 Mo. Rep., 48.) Hence, also, where the admission is of a mere opinion, it is no evidence.

The decision in *Atkyns vs. Sanger* is sustained, by the opinion of the Supreme Court of North Carolina, in the case of *McCraine vs. Clark and Wife*, (2 Murphy's Rep., 317,) and the subsequent opinion of the same court, in the case of *Hill vs. Buckminster*, (5 Pick. Rep., 391.)

In New York, the decisions on this question have not been uniform, but the general inclination of the courts of that State would seem to be against the admissibility of such testimony. In *Dan and Others vs. Brown and Others*, (4 Cowan's Rep., 483,) the court said they would not suffer one tenant in common to admit away the right of his co-tenant; and that his confession was no evidence against the others, though co-parties in the suit; that an admission by a party to a record, is evidence against him who makes it, and where there are parties, against them also, but not against others who happen to be joined as parties to the suit.

But the same court, even in the case of partners, held, that the confession of a debt by one partner, after a dissolution of the partnership, was inadmissible against the others, though joined in the suit. (*Hackley vs. Patrick*, 3 Johns. Rep., 528; *Gleason vs. Clark*, 9 Cow. Rep., 57; *Walden vs. Sherburn*, 15 Johns. Rep., 409.) Against this position may be found a series of respectable authorities, both in England and the United States. (*Wood and Others vs. Braddick*, 1 Taunton, 103; *White vs. Hale*, 3 Pick. Rep., 291; *Hathaway vs. Harkell*, 9 Pick. Rep., 42; *Cady vs. Shepperd*, 11 Pick. Rep., 401; *Lucy and Wilton vs. McNeille et al.*, 4 Dowl. and Ryl., 7.

We are not disposed to depart from the rule laid down in *Phillips, Starkie and Greenleaf*. It is thus stated by Mr. Greenleaf: "If the parties have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission

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made by one is, in general, evidence against all. They stand to each other, in this respect, in a relation similar to that of existing co-partners."

The exception made by the Supreme Court of New York, in the case of *Dan vs. Brown*, in favor of tenants in common, if admitted to be a sound one, does not reach the present case. The defendants here, by the common law, would have been joint tenants; they have a unity of interest, of title, of time and possession. Tenancy ~~at~~ common exists where there is a unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. One may hold in fee simple, and the other in tail, or for life; one may hold by descent, the other by purchase; one may hold by purchase from A, the other, from B. (Black. Com., 2 B., c. 12.) Hence, as this tenancy is defined by common law writers, there may be good reason for holding that the admission of one tenant in common shall not be evidence against his co-tenant; but it surely cannot prevail in a tenancy at common, where the tenants derive their title from the same source, and have an entire community of interest. Tenants in common, where they were in by several titles, had to sue separately; but not so where there is a unity of title and of interest.

The judgment will be reversed, and the cause remanded.

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An offence punishable otherwise than by death, or imprisonment in the penitentiary, is not a felony, within the meaning of the statute of 1835, concerning crimes and punishments; (Rev. Stat., p. 216, sec. 36;) therefore, in an indictment against a negro, or mulatto, for an attempt to commit a rape on a white female, which offence is punishable by castration, it is not necessary to aver that the act was done *feloniously*, or with a *felonious* intent. (Rev. Stat. 1835, p. 170, § 28.)

ERROR to Macon Circuit Court.

KIRTLEY, for Plaintiff in Error.

1. The verdict was clearly against the evidence.
2. Several of the jurors had prejudged the case.
3. The indictment is insufficient.

BAY, Attorney-General, for The State.

1. The offence charged is not a felony, under the act of 1835, concerning crimes and punishments, not being punishable "with death, or by imprisonment in the penitentiary," but by *castration*; therefore, it was not necessary to charge

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in the indictment, that the act was done *feloniously*, or with a *felonious* intent.—Art. 9, sec. 36, p. 216, of said act; *Johnson vs. The State*, 7 Mo. Rep., 183.

2. The evidence is not saved in a bill of exceptions, nor is the evidence in the cause contained in what, perhaps, was intended for a bill of exceptions, but merely the “*substance*” of the evidence.—Rev. Stat., 1835, p. 491, sec. 23; *Crane vs. Taylor*, 7 Mo. Rep., 285; and the cases referred to in the head note.

3. The defendant cannot object to the competency of the jury, having omitted to exercise his right of challenge either to the array or to the polls.

Besides, it does not appear, from the record, that the defendant was ignorant of the facts contained in the affidavits.—*Rex vs. Sheppard*, 1 Leach’s C. C., 101; *Booby vs. The State*, 4 Yerger, 111; *Lisle vs. The State*, 6 Mo. Reports, 431; Revised Statutes, 1835, “Practice and Proceedings in Criminal Cases,” art. 6, sec. 12, p. 490.

NAPTON, J., delivered the opinion of the Court.

The plaintiff in error was indicted and convicted for an attempt to commit a rape upon a white woman.

To reverse the judgment, three points are relied upon: first, that the indictment does not charge that the attempt was made *feloniously*; second, that the verdict is against the weight of testimony; and thirdly, that a portion of the jurors had prejudged the cause, and a new trial should therefore have been granted.

In relation to the last point, it is sufficient to observe, that the motion and affidavits upon which the action of the court was founded, though spread upon the record by the clerk, are not preserved by bill of exceptions.

It has been so often settled, that this Court will not disturb the verdict of a jury where no instructions have been asked or given, and where a state of facts is established by the evidence about which jurors or judges might differ, that it is deemed unnecessary to recite the testimony preserved in the bill of exceptions. The verdict is, in the opinion of the Court, satisfactory, and the judgment will not be reversed for the refusal of the Circuit Court to grant a new trial.

The first point in relation to the sufficiency of the indictment admits of doubt; yet the phraseology of our statute which defines the meaning of the term felony, would seem to forbid the adoption of any course other than the one pursued by the prosecution. The words of the act are singularly explicit; it declares, that the term felony shall be construed to mean, “any offence for which the *offender*, on conviction, shall be liable, by law, to be punished with death, or by imprisonment in the penitentiary, and no other.” The 28th section of the second article of the act concerning crimes and punishments, declares the punishment for rape, or attempt to commit rape, by a negro or mulatto, to be castration. It is difficult to resist the conclusion, then, that the offence described in this indictment is not a felony within the meaning of our statute, and therefore the prosecutor properly omitted the word “*feloniously*,” in describing the offence.

Judgment affirmed.

Samuel et al. vs. Morton.

SAMUEL ET AL. *vs.* MORTON.

The decision in *Davis vs. Davis*, (*ante*, 56,) that where a party wishes to avail himself of the error of the Circuit Court, in granting a new trial, he must tender a bill of exceptions, and abandon the case at that point adhered to.

ERROR to the Circuit Court of Platte County.

THOMAS and BALDWIN, *for Plaintiffs in Error.*

The Circuit Court erred:

1st. In granting the defendant a new trial. We contend, that I. S. Thomas was a competent witness for the plaintiffs, and that he had not such an interest in the event of the suit as would exclude his testimony. (See 1 Starkie's Ev., 104, 113, note *t*; "Principal and Agent," by Hammond, p. 318, 319.) And, even admitting that he was interested, the law allows him to be a witness from necessity. (1 Starkie's Ev., 113, note *t*, 121.)

2d. The court erred in refusing to grant the plaintiffs a new trial, as the verdict of the last jury was clearly contrary to the evidence, and the instructions of the court.

HICKMAN, *for Defendant in Error.*

1. The Circuit Court committed no error in granting defendant, Morton, a new trial after the first verdict; but, admitting that the court may have erred in this, the plaintiffs should then have rested their case: failing to do so, and having gone into the second and third trials, it is too late now to take any advantage of any error committed in granting such new trial.—See 8 Mo. Rep., 56, 136.

2. A settlement will not be opened without the most certain evidence of fraud or mistake.—1 J. J. Marshall, 508.

3. The possession of a note by the maker thereof, raises the legal presumption that it is paid; and to overcome this presumption, there must, at least, be something more than a mere preponderance of evidence.—See 3 Starkie, 1089, and authorities cited.

The Supreme Court will not interfere with the verdict of a jury, and direct a new trial, unless such verdict is clearly against evidence.—3 Mo. Rep., 326; 4 Mo. Rep., 295; 5 Mo. Rep., 489, 529; 6 Mo. Rep., 61.

TOMPKINS, J., *delivered the opinion of the Court.*

This suit was brought by George W. Samuel et al., against Benjamin R. Morton, before a justice of the peace, and the judgment of the justice was in favor

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of the defendant, Morton. From this judgment of the justice, Samuel appealed to the Circuit Court of that county.

The cause being removed to the Circuit Court, the plaintiffs, Samuel et al., had a judgment rendered in their favor.

The Circuit Court, on the motion of the defendant, granted a new trial. On the second trial, the defendant obtained a judgment in his favor.

On the trial of the cause, the following testimony appears, from the bill of exceptions, to have been before the jury:—James S. Thomas, a witness, stated, that some time in the beginning of the year 1841, the plaintiffs placed in the hands of the witness, for collection, a note or bond against the defendant and one Michael Byrd, for \$600, dated some time about the middle of June, 1839, and due some time in the fall of the year 1841, with interest from the date at the rate of ten per centum per annum; that the defendant made several payments along in the summer and fall of 1841, which were credited on the note or bond; the last payment was made in September, 1841, when the defendant paid to the witness the balance of the principal and interest, as the witness then thought, and he gave up the note or bond to the defendant, who took it away with him; that nothing more was said betwixt the witness and defendant about the debt until some time in January or February, 1842, when the witness was told by one of the plaintiffs, whilst making a settlement with him, and whilst the plaintiff was making the entry in his books of the moneys received by the witness, that he (the witness) had made a mistake, and had not received enough interest, having received only \$68 19-100 interest. The witness, then, referring to the books of the plaintiff, found that, according to the books, he had made a mistake of one year's interest. The witness mentioned the mistake to the defendant, who admitted the date of the note, and that it bore ten per cent. interest per year from the date, but stated that the note was lost, and not admitting the mistake charged by the witness. This witness, on a cross-examination, stated, that on a former trial, it is very probable, though he is not certain, he testified, that whilst he was calculating the interest on the bond or note, the defendant called his attention to a mistake in the defendant's favor of ten or twelve dollars.

The defendant then produced two witnesses, who testified, that, on a former trial of this cause, they had heard the witness for plaintiff, whilst testifying, state, that the defendant had called his attention to a mistake, made by him in the defendant's favor, of ten or twelve dollars.

This was all the evidence given on this trial, but on the former trial much other evidence was given, and as the history of both trials before the Circuit Court is sent up on this record, the counsel for the plaintiff has thought proper, on the last trial, to pray instructions, based not only on the evidence given on the last trial, but also instructions based on the evidence given on the first trial, but not given on the last; all of which, however, were given.

Other instructions were given by the court, at the prayer of the defendant, and exceptions were taken; but as the appellants, in their assignment of errors, confine themselves to the errors charged to have been committed by the court—

1st, In granting the defendant a new trial;

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2d, In overruling the plaintiff's motion to set aside the last verdict because it was against the evidence in the case, and in refusing to grant the plaintiff a new trial,—the instructions given for the defendant will be passed over without notice.

1. In *Davis vs. Davis*, 8 Mo. Rep., 56, it was decided, that where the Circuit Court improperly grants a new trial, and the party complaining wishes to avail himself of the error committed by the court, he should tender his bill of exceptions, and abandon his case at that point. As it was the plaintiff here who was dissatisfied, he might have suffered a nonsuit after the court had decided against him, and then have moved to set it aside for reasons properly preserved in a bill of exceptions: but he did not elect this method, and has chosen to await the issue of another trial; if that had have been successful for him, nothing more would have been heard of the errors now charged to have been committed by the court in setting aside the first verdict, and granting the new trial: but, having the choice of two remedies, he has elected one; he has tried the cause the second time in the Circuit Court, and the judgment of that court being given against him, it must stand, unless some error appears on the record. This brings us to the second error assigned.

2. Was the verdict in the case against the evidence given? It does not appear that any evidence offered by the plaintiff was excluded by the Circuit Court; he abandons all claim to any relief on account of the instructions given by the court, as he well might, for the court had given all he asked, and, as above observed, he had asked several for which he had laid no foundation in the evidence offered on the last trial; and the jury were left to judge, from the testimony of the plaintiff's own witness, whether all the interest on the note or bond (as it is called) has been paid. In *Singleton vs. Man*, 3 Mo. Rep., 467, (top-paging, 328,) the late Judge McGirk, delivering the opinion of the court, said: "When we see the testimony is stronger against the verdict than it is for it, still that is not any reason why we should interfere: it should strongly preponderate," &c. Again, in *Oldham vs. Henderson*, the same judge says—"As to the question whether the court ought to have granted a new trial, we are of opinion, that the court did right to refuse it. It is only in those cases where the Circuit Court clearly erred, that this Court ought to interfere," &c.—See 4 Mo. Rep., 301: to the same purpose, see *Martin vs. Withington*. In this last case, the verdict was found by the Circuit Court, sitting as a jury. (4 Mo. Rep., 521.) See, to the same purpose, *Mulliken vs. Greer*, 489, and *Steel vs. McCutchen*, 522, of 5 Mo. Rep., and *Dooly and Kirtland vs. Jennings*, 6 Mo. Rep., 61.

No relaxation of this rule has ever been allowed by this Court to the present time. In the case now before the Court, the plaintiff's witness stated, that with the note before his eyes he calculated the interest due, and surrendered the note, after receiving, as he then thought, the amount of the principal and interest; but some months afterwards, perceiving that he had not entered on his books as much to the credit of that note as he thinks he ought to have received, he is induced to believe he made a mistake against the interest of the plaintiff. But the jury had the testimony before them with instructions, which we must now regard as

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not excepted to, and which were certainly as favorable to the plaintiff as to the defendant, and they have found for the defendant. "When we see," as is said in the case just above cited, (*Singleton vs. Man*) "that the testimony is stronger against the verdict than it is for it, still that is no reason why we should interfere." It does not appear in this, that "the testimony is stronger against the verdict than it is for it." But in that case it is decided, that "the testimony against the verdict should strongly preponderate." This practice of allowing an appeal from the verdict of a jury to the Supreme Court, has been so long interwoven with our course of judicial proceedings, that the Court ought not now to attempt to alter it. But it is apprehended, that it might be worthy of the wisdom of the legislative body to deliberate whether it be not proper to make a change. In the case now before the Court, no impropriety is perceived in affirming the judgment of the Circuit Court.

PACKWOOD vs. THORP.

A person cannot have the actual possession of lands not occupied by him, unless he has the right of property in the land.

APPEAL from the Holt Circuit Court.

HAYDEN, *for the Appellant.*

1. The complaint made by the plaintiff before the justice of the peace is radically defective, and not such as is contemplated by law, and therefore will not authorize the judgment rendered thereupon by the Circuit Court.
2. The Circuit Court permitted the plaintiff to give to the jury incompetent and irrelevant evidence upon the trial of the cause.
3. The Court gave to the jury erroneous instructions upon the motion of the plaintiff.
4. That the Circuit Court rejected proper and legitimate instructions prayed for by the defendant.
5. The Circuit Court erred in overruling the motion of defendant for a new trial, and also the motion in arrest of judgment.

TOMPKINS, J., *delivered the opinion of the Court.*

Elvin A. Thorp brought his action of forcible entry and detainer, against Larkin Packwood, before a justice of the peace of Holt county, and obtained a judgment

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in the justice's court. Packwood appealed to the Circuit Court, and judgment being also rendered against him in that court, he appealed to this Court.

On the trial of the cause in the Circuit Court, the plaintiff, Thorp, proved, that some time in the month of December, 1840, he erected a cabin, on the quarter-section of land for which this suit is brought; and retained possession up to the time of bringing this suit: that he was a single man, more than twenty-one years old, and that he had no other improvement. He also proved, that he had bought this land from the defendant. The witness also testified that Thorp, the plaintiff, was his son, and that he executed his note to the defendant, for fifty dollars, with the witness as security; "*That there was under-written, that the note was given only for defendant's labor on said quarter;*" for the reason, that the defendant did not intend the trade to interfere with the defendant's pre-emption that he might acquire by virtue of his settlement on the quarter on which he lived: that defendant told the plaintiff, at the time of the sale, that he would retain possession of that part of his field which was on said quarter, being some three or four acres, till the land was brought into market, (it being public land) but told the plaintiff to go and take possession of the quarter, but he never delivered the possession thereof to the plaintiff, but he continued to hold the possession of the said three or four acres, and to cultivate them; and that some time in the month of January, 1842, the defendant built a rail-pen, or half-faced camp, on said quarter near defendant's [plaintiff's] field, and moved his family into it, where he remained till this suit was brought. It was also in evidence, that the defendant attempted to sell said note, but was prevented by the plaintiff's declaring that he would not pay it, because it was obtained by fraud; that he had understood that the defendant had said he would not let him have the said quarter, and that the defendant having heard this declaration of the plaintiff tore and destroyed said note, and moved upon the said quarter as aforesaid. It was also in evidence, that the plaintiff tendered the defendant fifty dollars in payment of said note, some few days before it became due, and that the defendant observed he had no claim against him, and refused to receive the money. It was also in evidence, that some time in the year 1839, before the lands were surveyed, the defendant had settled upon an adjoining quarter, where he had ever since lived, and cultivated it, except the time he lived on the quarter first aforesaid; and that, when the lines were run, the said three or four acres of the field aforesaid of the said last-mentioned settlement were found to be on the quarter first aforesaid: (the quarter sold by Packwood to Thorp, as I suppose.) This was all the evidence given.

The amount of all this evidence is this: that, in September, 1840, Packwood, the defendant, sold a quarter section of public land, on which he had cleared a field, to the plaintiff, Thorp. This is the land in dispute. Thorp executed his note to Packwood for fifty dollars, with the witness, Thorp's father, as security. This note was for the price of the land; and under the note was written, that the note was given only for the defendant's labor on said quarter, for the reason, that the defendant did not intend the trade to interfere with the pre-emption he might acquire by virtue of his settlement on the quarter on which he lived. This was a quarter section adjoining that he sold to Thorp. Packwood, then, seems to have

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believed, that the three or four acres of his field which were excepted from the sale to Thorp, were on that adjoining quarter section on which he had settled in 1839; but when the public lands were surveyed, he found that the three or four acres reserved, as aforesaid, out of the field which he had sold to Thorp, instead of being on the quarter on which he lived, were on the same quarter with the remaining part of the field, to wit, that which he had sold to Thorp. He then erected his camp, or cabin, on these three or four acres, near Thorp's fence, said, by mistake, to be defendant's fence. The building and occupation of this camp is the forcible entry and detainer complained of.

The sale, from the evidence, must have been verbal, for the condition was endorsed on the note given for the price or consideration of the land. Packwood, then, sold nothing but his right of possession of that field, and he did not sell the three or four acres of that field on which he entered and built the camp; and these three or four acres were not included with the plaintiff, Thorp's, fence.

On this evidence, the Circuit Court instructed the jury, at the instance of the plaintiff, that if they find the plaintiff had the actual and exclusive possession of the land, in the complaint mentioned, and that the defendant entered upon such possession against the will of the plaintiff, and detained the same at the time of the commencement of the suit, they will find for the plaintiff to the extent of his possession: secondly, that a man may have the actual and exclusive possession of land not inclosed.

The court gave these instructions, and the defendant excepted to the opinion of the court.

The land sold by Packwood to Thorp was land of the United States, as proved by the plaintiff himself. In the case of *Clark vs. Shultz*, 4 Mo. Rep., 235, it is said, that this kind of property is considered as no interest in the land, and a verbal sale of it may be made, notwithstanding the Statute of Frauds. The sale, then, of this right of possession in the field by Packwood to Thorp, was good. But Thorp's own witness (his father) proved, that Packwood refused to sell these three or four acres, on which he built the camp, and reserved them for the express purpose of gaining him a pre-emption, and believing them to be on the quarter section on which he (Packwood) had settled, adjoining to Thorp. But when the land was surveyed, it appearing that these three or four acres were on Thorp's quarter, Packwood fixes his camp on the land, in order to maintain his right of possession, and aid him in procuring a pre-emption.

Thorp did not, then, derive any right of possession to these three or four acres of land from Packwood by virtue of this purchase, and they were not inclosed in his field. In the case of *Kincaid vs. Logue*, 7 Mo. Rep., 169, it is said, "When a man is in possession of a tract of land, the whole of which is his own property, the possession of a part is the possession of the whole. Kincaid, the plaintiff in that case, had inclosed about two hundred acres of land, with the worm of a fence, and a fence built, in some places, on that worm,—in some places, three or four rails high, in others, one rail high: there were several gaps in this fence, and several public roads ran through said fence, inclosed as aforesaid. Logue had built a cabin on this land; and it was decided that Kincaid did not have such

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a possession of this land as to entitle him to maintain an action of forcible entry and detainer against Logue. The lines run around the quarter section on which Thorp lived did not give him a better right to the possession of a quarter section, than the sham fence made by Kincaid gave him to the possession of the 200 acres thus inclosed by him, as aforesaid. Then, if Kincaid could not maintain an action against Logue, then Thorp could not against Packwood. Again, in the case of *Sloane vs. Moore*, 7 Mo. Rep., 172, it was proved, that some time in the latter part of the year 1838, Sloane, the plaintiff, had built on the land in controversy, and had removed to it with his family, and had ever since resided there; and that, in the spring or summer of the following year, the defendant, Moore, built in the neighborhood, and within two hundred and fifty yards of the plaintiff's improvement, a cabin, and moved into it, and had ever since occupied it; and that, according to the surveys made, a quarter section will include Moore's house, if Sloane's house be made the centre. In that case it was contended, that, by the 29th section of the act concerning forcible entries, the plaintiff is entitled to bring his action against any person who settles so near him, that his house would be covered by a quarter section of land of which the plaintiff's house is the centre. The report of that case continues, stating, "That where no legal survey has been made at the time of the settlement, the act does give this right of action to one who has the right of pre-emption: but in that case, as it was not pretended that Sloane was entitled to any right of pre-emption, it was decided, that Sloane had no right of action against Moore, whose cabin was not built within the inclosure of Sloane. In this case, a legal survey was made, but the plaintiff, Thorp, had no right of pre-emption, to entitle him to the possession of the whole quarter section under the above-mentioned 29th section: we have also seen, that Packwood did not sell him the possession of the three or four acres here sued for. Thorp, then, could have no right of action against Packwood, for any land not inclosed within his fence; and, according to the decision in the case of *Kincaid vs. Logue*, this fence must not be a sham fence, but such a fence as a man might reasonably calculate to be sufficient to secure a crop. If the fence described in *Kincaid vs. Logue* was decided to be insufficient to give a right of action to Kincaid against Logue, for building a cabin in the enclosure, then the lines run by the surveyor around the quarter section will give Thorp no right to maintain the action of forcible entry and detainer against Packwood, because he built his camp within those lines. If Thorp had shown that he had acquired the right of property to the whole quarter section, that right of property in the whole quarter would have given the right of possession in the same quarter: but, by the evidence on the record, both Thorp and Packwood appear to be mere occupants of the public lands, and consequently entitled to that ground only which is inclosed within their respective fences, for it is not in evidence that Thorp actually occupied these three or four acres.

The decision of the Circuit Court, "that a man may have the actual and exclusive possession of lands not inclosed," is too broad. He can have no possession of lands not occupied by him, unless also he have the right of property in such land. The second instruction, then, was wrong, and for that reason the judgment in this case must be reversed, and the cause remanded.

BROWN vs. CRAWFORD COUNTY.

The act of February 25, 1835, "to provide for the sale of township school lands, in Saline and other counties," (Rev. Stat., p. 571,) authorizing the county courts, of the counties therein named, to sell the sixteenth sections, where, "on account of extensive prairies, or other local causes," there may not be fifteen free white householders resident in the township, is not inconsistent with the first section of the act of March 19, 1835, concerning "schools and school lands;" providing, that "in all congressional townships in this State, in which there are fifteen free white householders, they shall have the right to sell their sixteenth sections," &c. The latter is the general law, the former local, and confined to the counties therein named.

APPEAL from Crawford Circuit Court.

FRISSELL and MILLER, for Appellant.

W. G. MINOR, for Appellee.

1. To sustain the judgment of the Circuit Court, the appellee relies on the provisions of the act of the General Assembly of this State, entitled, "An act to provide for the sale of Township School Lands, in Saline and other counties," approved, February 25, 1835, (Statutes, 571): and it is contended, that this act is neither repealed nor abrogated, by the general law in relation to schools and school lands, approved March 19, 1835, (*Ibid.*, 561).

2. This local law, being for the public convenience, should be liberally construed. The intention of the legislature, as well as the remedial character of the act, may be readily gathered from its context, spirit and phraseology.—Seventh and Eighth rules in Bac. Ab., title, "Stat.," 389.

3. Under the rule of construction prescribed in Stat. Mo., 383, title, "Laws," sec. 28, both of the acts in the case now at bar should be deemed to have been passed on the same day.

4. Under a legitimate construction of the two acts, the demurrer was properly sustained. The appellee had no claim to the equitable interference of the Circuit Court, on the grounds that a patent could not issue from the auditor of public accounts, for this office could have no cognizance of the matter, until it had been certified to him by the County Court that the purchase money had been fully paid.—Stat. Mo., sec. 4, 5, p. 563.

5. There was no error in the judgment on the pleas.

6. The appellant's recourse to the equity jurisdiction of the court operated as a release of the errors (if any) in the proceedings at law.—Stat. Mo., 314, sec. 10.

7. In chancery, a demurrer, although general, is good, provided it apply to the whole bill, otherwise it must clearly express the particular parts of the bill demurred to.—Mitford, 214.

8. The record in this case is too imperfect, obscure, and irregular for the Court to act on it. (2 Terr. Laws, 265; Stat. Mo., 571, 561; 2 Atk. Rep., 150;

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1 Barrow, 447; Bac. Ab., title, "Stat.," 382; 1 Black. Com., *in notis*, 40; Com. Dig., title, "Parliament," 378; 1 Tuck. Com., 17; 2 Wash., 296; 4 Gill and Johnson, 4; Co. Rep., Forbes' case, 6, 63; *Ibid.*, Magdalen Coll., 6, 74; Bac. Ab., title, "Stat.," 389; Stat. Mo., 383; *Ibid.*, 714; Mitford's Ch. Plead., 214.)

NAPTON, J., *delivered the opinion of the Court.*

This was a bill in chancery to enjoin proceedings at law, by the county of Crawford, against the appellant. The bill sets forth, that in the year 1838, the complainant purchased four forty-acre tracts of land, in section sixteen, township 37, range 3 west, lying in the county of Crawford, and being school lands for the use of the inhabitants of said township; that the price given for the said lands was \$430; that the lands were purchased at a public sale, conducted by the sheriff of said county; that the complainant executed his bonds for the said purchase money, which bonds were renewed from time to time, adding the interest, until they amounted to \$640 86. These bonds, as the complainant alleged, became due on the 9th of February, 1843, on which day the complainant executed a mortgage of the said land to the county of Crawford, for the use of the inhabitants of said township, conditioned for the payment of said sum of \$640 86, payable in one year from the date thereof. The bill further states, that said mortgage is about to be foreclosed, and a judgment is expected to be entered against complainant at the term when this bill was filed. The bill then alleges, that when the petition for the sale of the said sixteenth section was presented to the County Court, there were not fifteen free white householders in said township, in fact not exceeding thirteen; that there are no prairies in said township, and said township is reasonably fertile, &c. The complainant further alleged, that he applied to the County Court for said county, to make out and forward to said auditor of public accounts an abstract of the lands purchased as above stated, but said court refused to do so, alleging as a reason, that the return of the sheriff, of the sale of said lands, was so defective, that they could not make out any abstract as required by law, and that even if the purchase money should be paid, with all the interest due thereon, no patent could issue; the prayer is for an injunction of the proceedings in foreclosing the mortgage.

To this bill the county of Crawford, by her attorney, demurred, and the demurrer was sustained by the court. To reverse the judgment upon the demurrer, this case is brought here by appeal.

We are of opinion, that this demurrer was properly sustained. By an act passed 25th February, 1835, the County Court of Crawford county was authorized to sell any sixteenth section in the county, notwithstanding there might not be fifteen free white householders in the township, whenever it appeared to their satisfaction that the provisions of the general law, in this respect, could not be carried out, in consequence of extensive prairies, or other local causes. It appears, from the bill, that the County Court has exercised its discretion in authorizing sales, and whether that discretion has been judiciously or legally exercised, is a matter that cannot be collaterally inquired into. Indeed, it is not alleged, in com-

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plainant's bill, that no local cause existed, which, in contemplation of that act, would have authorized the County Court to order a sale; but two causes only are negatived, to wit, extensive prairies and poor lands. There may have been other circumstances, within the meaning of the law of 1835, which would justify the county courts of the counties specified in causing the sale of their school lands.

It is suggested, that the act of February 25, 1835, was repealed by the general law concerning schools and school lands, passed at the same session of the legislature, but on a subsequent day. There is certainly nothing inconsistent or repugnant in allowing both acts to stand; the latter being the general law, and the former local, and confined to three or four counties. It is expressly enacted, by the 28th section of the act, entitled, "An act concerning the Revised Statutes," that, for the purpose of construction, "the revised statutes passed at the present session of the General Assembly shall be deemed to have been passed on the same day." Nothing, therefore, is to be inferred against the validity of the special act, which authorized the county of Crawford to sell her school lands, without restriction as to the number of inhabitants in each township, from the fact, that the general law, requiring fifteen free white householders in a township, before the County Court could sell, was passed subsequently to the former law.

As to the application, which the complainant alleges he made to the County Court, to make out and forward to the auditor of public accounts abstracts of the sales of township school lands in their county, we have only to observe, that if that court has failed in doing its duty in that behalf, the law has provided a mode of enforcing its performance.

In relation to the reason given, as alleged in the bill, for not forwarding said abstracts, and the opinion alleged to have been given by that court, that no patent could issue, they are matters upon which no action of a court, either of law or equity, could be legitimately founded.

Judgment affirmed.

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It is the right and duty of a jury to weigh the testimony, and give such credit to it as they may think proper. The judgment of the Circuit Court will not be set aside, upon the ground that the testimony did not warrant the verdict, unless a very strong and palpable case is made out against the verdict.

ERROR to the Circuit Court of St. Louis County.

HUDSON and HOLMES, for Plaintiff in Error.

1. A new trial should be granted when the verdict of the jury is so manifestly against the weight of evidence, that it is apparent the jury must have failed to

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give the cause a fair consideration, or must have mistaken the law as applied to the facts. Graham, "New Trials."

2. A new trial will be granted on the ground of a surprise, by the false swearing of a witness, when the facts falsely sworn to are material to the cause, and there has been no want of diligence on the part of the party seeking the advantage of it.—Graham, "New Trials," 168, 172, 184; 11 Price, 383; a case cited in Han. Dig., 1524.

PRIMM and TAYLOR, for Defendant in Error.

1. The court will not set aside the verdict of a jury unless it appear to have been manifestly against evidence, or the weight of evidence, unless palpable injustice has been done. (Graham on "New Trials," 362, 363; 3 Mo. Rep., 464, 467; 4 Mo. Rep., 295, 301.) Verdict must be decidedly against the weight of evidence. (12 Wend., 27; 11 *Ibid.*, 143; 2 Cowan, 479; 9 Johns. Rep., 36.)

2. When there has been conflicting testimony submitted to the jury, and the verdict supported by the testimony, the court will not disturb the verdict.—7 Mo. Rep., 57.

TOMPKINS, J., delivered the opinion of the Court.

This action was brought in the Circuit Court of St. Louis county, by Grandison P. Forrester against Clayton Tiffin, on a charge of negligence and unskillfulness in his practice as a physician and surgeon, in setting and curing the leg of the plaintiff, which had been fractured.

Much evidence was given in the case by the plaintiff, to show negligence and want of skill on the part of the defendant, appellant, and by the appellant to prove that the plaintiff did not take due and reasonable care of himself, and that the case was a difficult one, and that the appellant had been diligent, and treated the case skilfully. Professional men were called to prove, that, under the most skilful treatment, such fractures could not sometimes be cured, so as to cause the limb to be perfectly sound and strong.

The jury found the defendant guilty, and assessed the plaintiff's damages to seven hundred dollars, and judgment was given accordingly.

The defendant moved to set aside the verdict, and grant him a new trial, for the reasons following, to wit: *first*, the verdict was against the law, the evidence, and the weight of evidence; *second*, because the jury found their verdict [against] the instructions of the court; *third*, because the damages are excessive; *fourth*, because incompetent testimony was admitted to the jury.

Subjoined to these reasons for a new trial, is an affidavit of the defendant, Tiffin, of surprise by the false swearing of a witness in the case, the mother of the defendant in error, Forrester, and that he has merits, can make a good defence on another trial, &c. The counsel of the plaintiff in error seem to rely on this affidavit in their brief. They have not even assigned it as one of their reasons for a new trial. Nor, indeed, is it made a part of the record, by insertion thereof

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in the bill of exceptions. The clerk has thought proper to copy it into the history of the case, without any authority to do so. One of the reasons for a new trial is, that *incompetent testimony* was admitted to the jury; no objection was made, nor was there any exception to the admission of any of the testimony to the jury.

In the second reason for a new trial, as it is on the record, the word "against" does not appear. It was inserted in that reason, as copied into this opinion, and for that reason enclosed in brackets. The defendant might not, perhaps, have intended to say, that the jury found their verdict *against* the instructions of the court, for it does not appear on the record that any instructions were asked by either party, or that any were given by the court.

The appellant, not appearing to have called on the court to instruct the jury, but having left them to construe the law for themselves, cannot now complain that their verdict is against law. Left as they were to apply the law to the evidence in the case, they had enough of that to justify them in finding damages to the amount of seven hundred dollars. This Court is not accustomed to weigh the testimony nicely when the question is about setting aside a verdict, on account of the strength of the evidence against their verdict. The court might, perhaps, have been called on with as much propriety to instruct the jury in this case, as in most cases that have been tried there. But no instructions being asked, it cannot appear to this Court that the law has been disregarded by them. They had evidence before them in favor of the appellee, and it was their right and duty to weigh it, and give such credit to it as they thought proper.

The judgment of the Circuit Court is affirmed.

BARADA ET AL. vs. THE INHABITANTS OF CARONDELET.

1. The inhabitants of a corporate town are competent witnesses for the corporation, in a suit brought by the town, and in which the rights of the town are in controversy.
2. Where a person gives a bond, for the faithful discharge of the duties of an office, it is an admission of his appointment or title to the office, so far as to make him liable for official misconduct or neglect of duty.
3. Where the defendant demurs to the plaintiff's declaration, and the demurrer is overruled, and the defendant then pleads to the action, he must be considered as having withdrawn or waived his demurrer.

APPEAL from St. Louis County Court.

PRIMM, TAYLOR and POLK, for Appellants.

1st. The court below should have excluded the testimony of one Joseph Le Blond from the jury, for the reason, that said Le Blond was an inhabitant of said

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town of Carondelet, and had such an interest in the result of this suit, as to render him an incompetent witness to testify in this cause.—Angell and Ames on Corporations, 16; Greenleaf on Evidence, 380; 2 Johns. Rep., 175.

2d. There was no sufficient and legal testimony before the court and jury, that said Barada was the lawfully appointed treasurer of said town, and the court erred, in not sustaining appellant's motion to nonsuit the plaintiff.

3d. The court erred in its instructions to the jury, as to the law applicable to the cause made out by the proof.

4th. The court erred in overruling the demurrer to the first count of the declaration, when the same should have been sustained.

5th. The court erred in overruling appellants' motion for a new trial, when, by the law of the land, the same ought to have been sustained.

BocY and HUNTON, for Appellees.

1. The defendant introduced no testimony to sustain any of his pleas, except that different kinds of money had been paid to him, and that he offered to settle with the plaintiffs, if they would receive Mineral Point money.

2. Admitting that different kinds of money had been paid to defendant, as treasurer, yet he cannot avail himself of this, as he failed to specify and distinguish the different kinds of money thus paid him, as required by the ordinance under which he held his office. (See the ordinance.)

3. If depreciated money was paid to defendant, and he complied with the ordinance regulating and prescribing his duties, in distinguishing it in the book by him kept, yet, if he used the money for his own particular purposes, he is responsible for it in gold and silver.

4. By the testimony given by the defendant's own witness, it is proven that he failed to pay orders drawn upon him by the register of the town of Carondelet, long before the money which had been paid to him became depreciated; thus showing, that he had not kept the money paid to him, and had used it for his own purposes.

5. If an agent, such as the treasurer of a town, receives depreciated bank notes for his principal, and credits it to him as money, and is in the habit of paying out, on orders, the same kind of money which he received, and not distinguishing, in his accounts, the kind of money which he receives and pays out, but makes out his accounts in dollars and cents generally, he is liable to the principal for any balance in his hands, in the legal coin of the country.

6. The balance appearing to be due, by the book kept by the defendant, is *prima facie* evidence of such balance being due by the defendant in dollars and cents; and it rests upon the defendant to show, in order to entitle him to a credit, that that balance was made, not of money received and credited on general account, but of a special deposit of notes of the Bank of Mineral Point, which have always been kept on hand, and have been there, ready to deliver to the plaintiff on demand.

7. The witness, Le Blond, was a competent witness: although he is one of the

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corporators, he had no direct interest in the event of the suit; he comes within the rule, that a corporator, not disqualified on the score of interest, is a competent witness.—2 Starkie's Ev., 580, note c.; 1 Paige's Chan. Rep., 613, in the matter of Kip —; Angel & Ames on Corporations, 389, 390, and notes 1, 2, 3, 4 and 5. See chapter, "Digest of Cases," as to interest of witnesses, in Peake, 167, (*admission ex necessitate*); 1 Starkie on Ev., 120; Middleton vs. Frost, 4 Cant. & Payne, 15, or 19 Eng. Common Law Rep., 255; State of Connecticut vs. Bradish, 14 Mass. Rep., 294. See, also, Phillips on Ev., 97, 126.

8. When the interest of the witness is very remote, and uncertain, he is competent.—Fales & Smith vs. Belknap, 1 Johns. Rep., 486; Cowen vs. Haines, 11 Johns. Rep., 76; Bloodgood vs. The Overseers, &c., 12 Johns. Rep., 285; 1 Phil. Ev., 58, and note C; 4 Tenn. Rep., 17; King vs. Prossen, —; Bent vs. Baker, 3 Tenn. Rep., 27.

9. A commoner is inadmissible to prove a right of common, unless the common be claimed by prescription, in the right of a particular estate. The reason of the rule is, that, in case of customary commoners, a verdict in an action for or against one, is evidence for or against another claiming the same right.—Jacobson vs. Falls, 2 Johns. Rep., 170, (see opinion of Justice Thompson); Lord Raymond, 731; Doug., 374; Skinner, 174; 1 East., 355; 1 Tenn. 302, 303; Peake's Ev., 31.

10. By the modern practice, where the interest is very small and remote, the objection goes to the credibility of the witness, and not to his admissibility.

TOMPKINS, J., delivered the opinion of the Court.

This is an action of assumpsit, commenced in the Court of Common Pleas of St. Louis county, against Peter D. Barada and others, by the inhabitants of the town of Carondelet. The declaration contained three counts. The first is founded on a writing, purporting to have been executed by said Barada, and by two others, as his securities, acknowledging themselves to be held and firmly bound to the plaintiffs, in the sum of three thousand dollars, subject to the condition following, viz.: "That whereas the said Peter D. Barada was re-appointed, by the board of trustees of the town of Carondelet, treasurer of the said town, from and after the 24th day of April, in the year 1841, it was conditioned, that if the said Peter D. Barada should well and truly perform the duties of his office, aforesaid, &c., and render a true account of all moneys in his hands, &c., and pay over the same, as requisite, then the said writing to be null and void, otherwise, to be and remain in full force and virtue, &c." It is then averred, that a large sum of money came to his hands as treasurer, as aforesaid, and that said Barada had not paid it over, &c. The other two counts of the declaration were the common money counts. To this first count, there was a demurrer. The demurrer was overruled, and leave given to the defendant to plead. No judgment was entered on the demurrer, and the defendant then pleaded to all the counts. 2d. To the first count, a sham plea, not supported by one word of evidence, is pleaded. 3d. The third plea is also to the first count, and is equally unsupported by evidence, to wit, that at the commencement of this suit, the said Barada had on hand,

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and since that time, has had, and still continues to have, and still has in his hands, three hundred bank notes, of the Bank of Mineral Point, of the denomination of five dollars each, which bank notes were so placed in said Barada's hands, by the plaintiffs, for safe-keeping, and which said bank notes the said Barada has always been ready and willing, and before commencement of this suit, &c., offered, and was ready to deliver to the said plaintiffs, &c. 4th. The fourth plea denies that the defendant, Barada, ever was treasurer: this plea is pleaded also to the first count. 5th. In the fifth, the defendant pleads, that he has paid the several sums in the said declaration demanded, &c. 6th. In the sixth, the defendant pleads a set-off.

Replications are filed to all these pleas, and issues made. A verdict was found for the plaintiffs, on all the issues; the damages were assessed twelve hundred and five dollars and ninety-eight cents, and judgment rendered accordingly.

The bill of exceptions shows, that on the trial, the plaintiffs read in evidence the charter of the town of Carondelet, and the proceedings of the corporate body appointing the defendant treasurer, and also the instrument of writing on which the suit is founded.

The plaintiffs then produced, as a witness, one Joseph Le Blond, a corporator of the said town of Carondelet, and the defendants moved to exclude him, as incompetent, from interest: the motion was overruled, and exceptions taken. The plaintiffs then produced, and proved by said Le Blond, certain ordinances passed by the corporation of the town, and among them the record of the proceedings of the corporate authorities of said town, appointing the defendant treasurer, and read in evidence the record of the appointment of the defendant, Barada, as treasurer of said town.

They then produced, and proved by said Le Blond, a book kept by said Barada, as treasurer aforesaid, by which it appeared, that on the 20th August, 1841, by a settlement then made, there was in his hands, of the money of the corporation, \$1,135 95. It was then proved, by the testimony of said Le Blond, that the defendant, Barada, was removed from his office of treasurer, by the corporate authorities, in August, 1841. No other evidence was given by the plaintiffs.

Thereupon, the defendants moved the court to enter a nonsuit against the plaintiffs, on the ground, that it did not appear, from the testimony, that Barada was lawfully the treasurer of the said town of Carondelet. The motion was overruled by the court, and its decision excepted to.

The defendant then introduced one McLaughlin as a witness, who stated that he was three years collector of said corporation, to wit, during the years 1839, 1840 and 1841; and register, four or five years, ending in July, 1842: that, while he was collector, he collected and paid over to said treasurer the notes of various banks, amongst the rest, many of the Mineral Point Bank; they were esteemed the best; that he had collected, and paid over to the treasurer, perhaps, as much as one thousand six hundred dollars in that money; that, at the time the board were about to remove Barada from his office of treasurer, he appeared before them, and stated, that he was ready to pay over to them the balance in his hands as treasurer, if they would receive it in the notes of the Mineral Point Bank: this offer was made a short time before the commencement of the suit. The board

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refused to take it. The witness stated, that, as register, it was his duty to draw on Barada, as treasurer, orders for money owing by the corporation; that he is under the impression that Mineral Point money went down, (depreciated) in 1841; that it is his impression, that several of his orders, drawn on the board, were refused, and that the knowledge of such refusal of payment was brought before the board, prior to the time Mineral Point money was discredited. No other evidence was given in the case.

The court then gave the jury four instructions, of which it will not be material to notice any but the third, as in it is incorporated every principle involved in the others; it is as follows:

The settlement and account, made by the defendant with the plaintiffs, showing a balance due the latter of one thousand one hundred and thirty-five dollars, are *prima facie* evidence of such balance, due by the defendant to the plaintiff in dollars, and it rests upon the defendant to show, in order to entitle him to a verdict, that that balance was made up, not of money received and credited on a general account, but of a special deposite of notes of the Bank of Mineral Point, which have always been kept on hand, and have been there ready to deliver to the plaintiff on demand.

No exceptions were taken to these instructions. But after verdict, a new trial was moved, because—1st, the verdict was against law; 2d, against evidence; 3d, against the weight of evidence; 4th, because the court gave erroneous instructions to the jury; 5th, because the court overruled the defendants' motion for a nonsuit; 6th, because the court admitted an incompetent witness to testify.

This motion was overruled, and the defendant excepted.

It is assigned for error, 1st, That the court admitted the evidence of Joseph Le Blond, a corporator.

2d, That the court overruled the appellant's motion to enter a nonsuit against the plaintiff, on the ground that it did not appear, from the evidence, that said Barada was lawfully the treasurer of the town of Carondelet.

3d, That the court gave improper instructions to the jury.

4th, That the court overruled the appellant's motion for a new trial.

1. Joseph Le Blond was an inhabitant of the incorporated town of Carondelet, a member of the body corporate. See Greenleaf's Evidence, p. 380, where it is said, "Corporations, it is to be observed, are classed into public, or municipal, and private corporations. The former are composed of all the inhabitants of any local or territorial portions into which the country is divided by political organization. Such are counties, towns and the like. These, considering the public nature of the suit, the minuteness of the interest, &c., are admitted as competent witnesses, in all cases in which the rights and liabilities of the corporation only are in controversy. But members, or stockholders, in institutions created for private emoluments, though not parties to the record, are not, therefore, admissible as witnesses; for, in the matters in which the corporation is concerned, they have, of course, a direct, certain, and vested interest, which necessarily excludes them." See same book, p. 383. Joseph Le Blond was then a competent witness, and no error was committed by the court, in admitting his evidence.

The second error assigned is, that the court erred in overruling the defendant's motion to enter a nonsuit against the plaintiffs, on the ground, that it did not appear that Barada was lawfully the treasurer of the town of Carondelet.

The plaintiff is, in no case, compellable to be nonsuited, and therefore, if he insist upon the matter being left to a jury, they must give in their verdict. (Tidd's Practice, 796.) To the same purpose, see 5 Bacon, title, "Nonsuit," letter A. The court, then, had no authority to tell the plaintiff he should take a nonsuit. We will now examine whether there was any evidence that this man, Barada, was, in his own language, lawfully treasurer.

To pass over in silence the ordinances authorizing the creation of a town treasurer, and the proceedings of the corporate authorities, proved by the witness, Le Blond, in appointing him treasurer, the declaration itself, in this case, is founded upon an instrument of writing, charged to have been executed by the defendant, which instrument, the statute declares, shall be received in evidence, unless the party charged to have executed it deny the execution thereof, by plea verified by affidavit. (Section 18 of 4th article of the act to regulate practice at law, p. 463 of the Digest of 1835.) By this instrument of writing, in no way denied by plea verified by affidavit, he undertakes to discharge the duty of treasurer. "Where one has assumed to act in an official character, this is an admission of his appointment, or title to the office, so far as to make him liable, even criminally, for misconduct, or neglect of that office." (Bevan vs. Williams, 3 T. Reports, cited in Greenleaf's Evidence, p. 228.)

3. That the court gave improper and illegal instructions to the jury. The defendant has not excepted to these instructions. Exceptions should be taken in the progress of the cause. (See Practice at Law, article 4, sec. 20, and Consaul et al. vs. Liddell, 7 Mo. Rep., 253.) The first we learn of any objection to the instructions, is on the motion for a new trial, which might have been four days afterwards. His exceptions, then, do not appear to have been taken in due time. But the defendant's counsel has not ventured to cite any authority against the instructions, and they appear to me to be founded in good sense. The fourth assignment of errors is, that the defendant's motion for a new trial was overruled. The law appears to have been very well explained to the jury, and they had an abundance of evidence to justify their finding, the defendant's own books showing him to be in arrears \$1,135 95. The verdict is for \$1,205 98. The excess, it may be supposed, is the damages allowed by way of interest, the payment of which might readily have been avoided by paying the principal at once.

But there is another assignment of errors, to wit, that the court overruled the defendant's demurrer to the first count in the declaration. No judgment was entered on this demurrer, and the defendant, by pleading to the whole declaration afterwards, must be supposed to withdraw his demurrer, and therefore it should not have appeared on the record. But the first count seems to me a very good one, and the defendant's counsel have not pointed to any defect in it.

The judgment is affirmed.

Benton vs. O'Fallon, Executor of Mullanphy.

BENTON vs. O'FALLON, EXECUTOR OF MULLANPHY.

1. B., in 1819, mortgaged the lot in question to M., who obtained a judgment of foreclosure, in 1824, upon which no execution was issued. A few days after the judgment, M. signed a writing, to the effect, that he would convey to B. a certain lot whenever B. redeemed the mortgage. In 1827, M. purchased the equity of redemption of B., in the mortgaged lot, at sheriff's sale, under a judgment against B., in favor of the Bank of Missouri.

B., in 1837, filed his bill to redeem the lot, upon the ground that the sale, in 1827, was illegal and void, and that the writing signed by M., in 1824, gave B. an indefinite time for redemption.

Held: That the sale of the lot, in 1827, was legal, and that M., at such sale, purchased the equity of redemption of B. The purchase of M., at this sale, was entirely independent of the judgment of foreclosure and the subsequent agreement, and could not be affected thereby.

2. The interest of B., in the lot mortgaged, continued to be an equity of redemption, after the judgment of foreclosure, until the sale of the equity, in 1827, to M.

APPEAL from St. Louis Court of Common Pleas.

SPALDING and TIFFANY, for Appellant.

1. The interest that Benton had in the lot in question, embraced in the mortgage, was not vendible on execution. (Geyer's Digest, 307, 8; Old Revised Code, 593-5; 12 Mass. Rep., 387.) That a statutory right to redeem not vendible on execution, Old Rev. Code, 462, shows alienee subject to prior judgment.

2. Incumbrance is held extinct by merger, or not, according to justice and equity.—6 Johns. Ch. Rep., 395.

3. The lot west of the mortgaged property ought to be conveyed to Benton. (1 Madd. Ch., 362, 368, 376.) 1. Possession was not tenancy: no rent stated: no possession of lot by Mullanphy. 2. Mortgage is paid off by the purchase by Mullanphy: what, then, has become of the \$250? Mullanphy cut off the right to redeem by sale.

4. Laches does not prevent continued possession by Benton.

H. R. GAMBLE, Counsel for Appellees, submitted a written argument upon the points made by appellant's counsel.

NAPTON, J., delivered the opinion of the Court.

This was a suit in chancery, to redeem a mortgage upon a lot in Saint Louis, commenced in the Circuit Court, and afterwards transferred to the Common Pleas of St. Louis. The original bill was filed in 1837; it stated, that complainant, to secure to Mullanphy the payment of \$2000, payable twelve months after date, with interest at ten per cent. per annum, payable semi-annually, mortgaged to him, in June, 1819, the lot in question; that Mullanphy died in 1833, leaving as

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his executor and heirs the parties defendants. The bill alleged, that the complainant, ever since the execution of the mortgage, has remained in possession; that the interest upon the mortgage debt has been regularly paid to said Mullanphy during his life-time; that, since his death, and in June, 1837, he tendered to O'Fallon, executor of said Mullanphy, the principal and interest due on said mortgage, for the purpose of redeeming, but said O'Fallon refused to accept the same.

The defendants answered, denying, that the complainant had paid the interest on the mortgage debt, and alleging, that in November, 1824, a decree of foreclosure was made in the Circuit Court of St. Louis, ascertaining the debt and interest as amounting to \$3,083 34.

The answer further alleged, that in March, 1826, the Bank of Missouri recovered a judgment against complainant for \$7,076 14; that execution issued on this judgment, 8th February, 1827; that a levy and sale followed, in accordance with law, and the sheriff, by deed, dated April 2, 1827, conveyed to Mullanphy all complainant's interest in said lot.

The answer admits, that the said complainant, Benton, has remained in possession of the property ever since the mortgage was executed; but insists, that such possession was in the character of tenant, ever since the purchase, by Mullanphy, under the execution.

At the November term, 1838, the complainant filed an amended bill, in which the judgment in favor of the Bank *vs.* Benton is admitted, and the execution, levy and sale, but charges that said judgment, execution and sale, were irregular and void; that there was no such corporation existing as the President, Directors & Company of the Bank of Missouri, the charter having expired by non-user, &c.

At the November term, 1840, the bill was again amended, at the instance of the complainants; this last amended bill set forth the mortgage and proceedings to foreclosure in 1824, judgment, &c., but alleged that no execution ever issued thereon; that, after the rendition of the judgment, to wit, on 10th November, 1824, complainant and Mullanphy had a settlement, and that said Mullanphy, having purchased, at sheriff's sale, a lot of ground, lying west of and adjoining the mortgaged premises, then proposed to sell the same to complainant, as being a convenient appendage to said complainant's mansion-house, said mansion-house being the same property mortgaged, for the sum which he (Mullanphy) had paid for the same; that, at the same time, said Mullanphy agreed, that the said complainant might redeem the said mortgaged premises, and that, when the complainant should redeem said premises, he, Mullanphy, would convey to him the lot of ground lying west and adjoining to the same; that the complainant then paid to Mullanphy the sum of \$250, the price asked by him for the lot lying at the west of said mortgaged premises, and that said Mullanphy further agreed, that if the complainant did not redeem, he should be credited with the \$250. Bill charges, that said sum of \$250 was never credited, &c.; that said Mullanphy, as evidence of the aforesaid agreement signed a memorandum, entered by the complainant in his private memorandum book, in the words following: "Novem-

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ber 10th, 1824.—This day adjusted all accounts with Mr. John Mullanphy, and paid him all outstanding balances, the mortgage in suit, and his assumpsit, to convey to me the lot west of me, on my paying up the mortgage, or crediting me with \$250 if I did not, being reduced to writing, and closing our business.

“JOHN MULLANPHY.”

The amended bill further charges, that said lot lying west, &c., in equity belongs to complainant; and avers, that, by the terms of the above agreement, the complainant was permitted to redeem the mortgage premises for an indefinite time; and complainant avers, that, at the time of the settlement aforesaid, he paid to said Mullanphy all the interest upon the mortgage debt up to that time, and hath since paid the same interest to the present time: complainant not only, then, claims a right to redeem the mortgaged premises, but prays a conveyance of the lot west, &c.

The defendants answered the amended bill, by stating their ignorance of the agreement set out, relying on the Statute of Frauds, if such agreement was made, and alleging that such agreement, if made, was abandoned by the parties, since the complainant had long paid rent for the premises.

On the hearing, the complainant gave in evidence the record of the foreclosure; a deed to Mullanphy for the lot west of the mortgaged property, and the memorandum signed by Mullanphy, as set out in the amended bill.

The defendants proved, that complainant had resided on the mortgaged premises during his residence in this State, and had occupied no other house of Mullanphy's, and produced a letter from complainant, as follows:

“WASHINGTON, December 10th, 1832.

“Dear Sir:—I enclose you a certificate of deposite to your credit, in United States Branch Bank in this city, for the rent of the current year, and continue the place for the next year.—Yours, respectfully, THOMAS H. BENTON.

“Mr. JOHN MULLANPHY, St. Louis.”

The defendants also gave in evidence, the judgment in favor of the bank, the execution, sale, and sheriff's deeds, under which they claimed the property.

Upon this testimony, the bill was dismissed, and the complainant appeals.

The claim of the appellant is based upon the alleged invalidity of the sheriff's sale, in 1827, and upon the memorandum, signed by Mullanphy, which, it is contended, gave Benton an indefinite time for redemption.

The first proposition depends upon the saleability of an equity of redemption under execution, in 1827; and this question, since the case of *McNair and Others vs. Mullanphy's Executors and Heirs*, has been thought to be settled. In that case, the saleability of an equity of redemption under *feri facias*, by virtue of the act of 1807, was deliberately examined, and the legality of such sales sustained, after an elaborate discussion at the bar, and with a knowledge of the weight respectable authority arrayed against the position. The reasons which influenced the court, in its decision, were fully detailed in the opinion delivered by Judge Scott; and in that portion of the opinion, it is understood, Judge Tompkins entirely concurred. If the language of the act of 1807, which declares, that all the lands, tenements and hereditaments “should be liable to be sold on exe-

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cution, be held sufficient to comprehend equities of redemption, *a fortiori*, the act of 1825, which subjects" all the lands, tenements and real estate, whereof such person was seized in law or equity, to execution, will embrace such interests.

But it is attempted to withdraw the present case from the operation of this decision, by contending, *first*, that Benton's interest in the land, after the judgment of foreclosure, was not an equity of redemption; and, *second*, that the judgment obtained by Mullanphy, in 1824, operated as an estoppel, and prevented him and his heirs from ever denying the right of Benton to redeem.

The act under which the judgment of 1824 was obtained, provided that the sale should not take place until nine months after the filing of the petition, and declared, that until the sale, the mortgagor might redeem, by paying the debt, interest and costs. (Geyer's Digest, 308.) This right of redemption, until it was cut off by sale, we suppose would have been necessarily incident to the nature of the proceedings, without any special recognition of it in the statute. The act, in this respect, appears to be merely declaratory, and the principal object of the section in which this right of redemption is mentioned, is to fix the time within which the sale may take place, giving the mortgagor some privileges not extended to other debtors. The proceedings, under this act of 1807, as has been decided by this Court, in more than one case, are proceedings at common law, and are not governed by the rules which regulate proceedings in chancery. The judgment is merely for the recovery of the mortgaged debt, and a special *feri facias* issues against the mortgaged property. Until levy and sale, the relations of the parties are not changed; the right to pay off the debt, interest and costs is the same right which every debtor has against whom there is a judgment; a right, as was observed by the counsel for the appellees, to prevent the sale of his property under execution, by paying up the debt.

The case of *Kelly and Wife vs. Beers*, (12 Mass. Rep., 388,) does not sustain the position of the appellant. The law of Massachusetts authorized the officer to sell the right of redemption; but, by the same law, the debtor was allowed, after the sale, three years, to redeem, as against the purchaser. The court held, that after sale, nothing remained in the judgment debtor upon which an execution could operate. The debtor had not, according to the view which the court took of the act, any estate or interest in the land, but a mere privilege or right to redeem within a specified time, which was likened to a right of pre-emption.

The case is certainly not analogous to the present. In Massachusetts, the debtor, after the sale of his equity of redemption, had a right or personal privilege as against the purchaser, to redeem within three years. This right, thus given by the statute, was considered not vendible under execution, nor, indeed, transferable to any other in any way. The privilege was confined to the debtor. Our statute conferred no such privilege; but merely declared, what would have been the law without any such declaration, that, up to the sale, the mortgagor could redeem, by paying off the debt. The interest and estate of the mortgagor remained the same, after judgment, as before, and continued to be an equity of redemption, until it was cut off by sale. Indeed, if the judgment annihilated, or cut off the mortgagor's estate in the mortgaged premises, upon what could the

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special *fiery facias*, authorized by the act, operate? If the mortgagor had no longer any equity of redemption, but a mere "*facultative interest*," upon which no execution, at least, in favor of any third person could operate, of what avail would be the execution issued at the instance of the mortgagee?

The whole argument rests upon the assumption, that our statutory proceedings to foreclose a mortgage operates in the same mode as the ancient method of foreclosing a mortgage in equity. Hence the counsel insists, that, by the judgment of foreclosure, the mortgage debt is absorbed, just as much as, on a judgment on a note or bond, the instrument is absorbed, and the simple contract, or specialty debt, is converted into a debt of record. It may be admitted, that the mortgaged debt is absorbed by a judgment of foreclosure under this statute, so that the mortgagee could not again bring a suit upon the mortgage, but it does not therefore follow, that the mortgagor's estate or interest in the land has been swallowed up in the judgment, so that no execution can reach it.

In short, if the construction contended for were the true one, the statute would afford a very convenient mode of protecting the largest estates from the reach of creditors. A debtor might mortgage his whole estate, a large and valuable one, we will suppose, for an inconsiderable sum, and by suffering a judgment of foreclosure, protect it indefinitely from the executions of every other creditor. This could not have been the intent of the law.

But it is said, that, admitting the general saleability of the complainant's equity of redemption, Mullanphy could not become the purchaser, because, *first*, he was estopped by the judgment of foreclosure, from denying the redeemability of the mortgage; and, *second*, it is against the policy of the statute to permit Mullanphy, in this way, to foreclose and cut off the complainant's equity of redemption.

The opinion of this Court, in the case of McNair and Others vs. Mullanphy's Executors and Heirs, is cited in support of the first of the two objections.

In that case, Mullanphy, in 1823, brought suit upon the bond, (to secure which the mortgage was given) obtained judgment and execution, and purchased the mortgaged premises levied on, at sheriff's sale. Afterwards, in 1824, he brought a petition for foreclosure, and obtained a judgment; which judgment continued unexecuted and unreversed, until the institution of the proceedings to redeem. The court considered the judgment of foreclosure a solemn admission of McNair's right to redeem.

That case, in all its leading features, is certainly very dissimilar to the present. There the main objection to Mullanphy's title was clearly founded on the fact, that he himself instituted a suit for the money secured by the mortgage, had the execution levied upon the mortgaged premises, and became the purchaser at the sale, thereby claiming to have extinguished the equity of redemption. Such proceedings, on the part of the mortgagee, if tolerated, would most obviously have defeated many important rights and privileges, secured to mortgagors by the statute directing the mode of foreclosure.

In the present case, Mullanphy obtains a judgment of foreclosure, upon which, it seems, no execution is issued; three years afterwards, a suit is instituted against Benton, by the Bank of Missouri, judgment recovered, and an execution

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levied upon Benton's equity of redemption. Mullanphy becomes the purchaser, and thereby unites the equitable to his legal title, unless such purchase was void or inoperative. How the judgment of foreclosure, obtained three years previous, is to preclude Mullanphy from afterwards buying the equity of redemption, set up at public auction, by persons, and through proceedings over which he had no control, we are at a loss to conjecture. Conceding this judgment of foreclosure to have been a solemn admission of the complainant's right to redeem, it is difficult to see how it is to prevent him from subsequently acquiring a complete title.

There is nothing in the policy of the law to forbid the acquisition of the equity of redemption in this mode. We must not overlook the important fact, that the sale, at which Mullanphy purchased, was not occasioned by any act of his, nor was it the result of the proceedings at all under his control; and to maintain that the policy of the mortgage act prohibits his purchasing at such a sale, must amount to the general proposition, that a mortgagee cannot bid at a sale under execution of another creditor; a proposition which is not sustained by any of the courts, watchful as they have been of the interests of the mortgagor, and careful as they have been to prevent any undue advantage being taken.

The second point relied upon by the appellant, is the agreement contained in the memorandum, signed by Mullanphy, and set out at large in the complainant's amended bill. This memorandum is dated in 1824, ten days after the judgment of foreclosure, and seems to be an agreement on the part of Mullanphy, that he would convey to Benton the lot west of the mortgaged premises, whenever he (Benton) redeemed said mortgaged lot, and if said lot was not redeemed, that he would credit him with \$250. It does not appear, from the terms of this agreement, that any time was specified, within which the redemption of the mortgage might be effected. Three years afterwards, (in 1827) Mullanphy purchased the equity of redemption, and from that time, up to his death, according to the answer of the defendants, complainant occupied the premises as Mullanphy's tenant. The agreement to convey the lot west of the mortgaged lot was made conditional, on the payment of the mortgaged debt. That condition was not complied with, previous to the extension of the equity of redemption, in 1827.

This memorandum, like the judgment of foreclosure, with which it was contemporary, can interpose no obstacle in the way of the subsequent acquisition of title in 1827, from a source and in a mode entirely disconnected with, and independent of, either the agreement or judgment.

It would seem, from the answer of the defendants, sustained, as it is, by the most satisfactory proof, uncontradicted and unexplained, that in 1832, this agreement was considered, by both parties, as abandoned, or virtually annulled by the conduct of Mullanphy in 1827. The letter of the complainant to Mullanphy, in 1832, enclosing money or draft to pay the rent, and contracting for the occupation of the premises as tenant for another year, is conclusive, as to the understanding of the parties at this time.

As to the \$250, alleged to have been advanced as the purchase money of this lot, thus contingently agreed to be conveyed, we do not see how any question can arise in relation to it, until Mullanphy attempts to enforce the collection of the

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bond for which the mortgage was given, and upon which it was to be a credit, in the event the mortgage was not redeemed.

Judgment affirmed.

RANDOLPH vs. ALSEY, (A COLORED PERSON.)

A party who complains of erroneous instructions must take his exceptions at the time the instructions are given. Exceptions to the opinion of the court must be taken in the progress of the trial, and not after the trial.

ERROR to St. Louis Circuit Court.

SPALDING and TIFFANY, for Plaintiff in Error.

1. The first instruction is broad; because, holding a slave to service at the salt works, near Shawneetown, did not, of course, set him free.—See Constitution of Illinois, article 6, sec. 2.

2. The second instruction is objectionable, for the same reason as the first, and is not made applicable to the facts of the case, which show that Alsey was held in the salt tract, and before 1825, and this instruction precludes the jury from inquiring whether she was so held there, as to be protected by the second section of the sixth article of the constitution.

3. The instructions are both wrong, in assuming that Cross' assent to Alsey's being held a slave in the salt reservation, of course, worked her freedom; and also, in substantially declaring to the jury, that there was no evidence that Alsey's residence there was such as was authorized by the above quoted section of the constitution of Illinois.

MURDOCK, for Defendant in Error.

TOMPKINS, J., delivered the opinion of the Court.

Alsey brought her suit for freedom, in the Circuit Court of St. Louis county, on the ground of residence in the State of Illinois. The defendant, Randolph, pleaded "Not guilty." The Circuit Court gave judgment for the plaintiff. The defendant filed a motion for a new trial, for the following reasons, the first four of which may be resolved into this one: That the verdict is against the law and evidence; 5th, That the Circuit Court gave wrong instructions to the jury.

To this last reason, it is sufficient to say, that the defendant did not except to the instructions when they were given, and now comes with a bad grace to ask

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a new trial, for the reason that the Court gave instructions, to which, at the time they were given, he did not think proper to object. As to the objection, that the evidence is against the finding of the jury, this Court is not accustomed to weigh the evidence nicely, when it has been left to a jury on instructions that have not been excepted to. It is no exception to instructions, to move for a new trial, where the instructions are then first said to be wrong. Exceptions to the opinion of the court must be taken in the progress of the trial, not after the trial.—20th section of 4th article of the act to regulate practice at law, p. 464 of the Digest of 1835. See, also, *Consaul et al. vs. Liddell*, 7 Mo. Rep., 253.

For anything appearing in this record, the motion for a new trial, even, might not have been made within some days after the day of trial. The evidence, however, has been examined; and if this Court were even disposed to invade the province of the jury, no reason is seen why it should be done.

The judgment of the Circuit Court is, then, affirmed.

DAVIS, GARNISHEE OF FLEMING, vs. KNAPP & SHEA.

If the plaintiff denies the truth of the answer of a garnishee, it is incumbent upon him to prove that the answer is intruc. The law presumes the answer to be true, until the contrary is made to appear by the plaintiff.

APPEAL from St. Louis Circuit Court.

McPHERSON, *for Appellant.*

HICKMAN, *for Appellees.*

No exception was taken at the time to the opinion of the court, in overruling the motion to dismiss, because the jury fee had not been paid, and the grounds upon which such motion was overruled has not been preserved; and if the Circuit Court erred in overruling said motion, and exceptions had been taken, the defendant should there have rested his case.—Revised Code, p. 464, sec. 20; 7 Mo. Rep., 250, 285; 4 Mo. Rep., 445; first part 8 Mo. Rep., 56; last part 8 Mo. Rep., 505.

The evidence shows that defendant, Davis, was indebted to Fleming between the 26th November, 1842, (the time of the execution of the summons on Davis,) and the 26th of January, 1843, when he (Davis) filed his answer. He is therefore responsible to the plaintiffs for any amount he owed or paid to Fleming between

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these days, until plaintiff's judgment against Fleming was satisfied.—Sergeant on Attachment, 101, 2, 3.

The issue in this case was the indebtedness of Davis to Fleming, and the jury having found for the plaintiffs, upon the evidence, this Court will not reverse unless such finding was clearly against the weight of evidence.—6 Mo. Rep., 61.

TOMPKINS, J., delivered the opinion of the Court.

Knapp & Shea commenced an action before a justice of the peace of St. Louis county against John Fleming. Judgment was there obtained for sixty-one dollars, and execution was issued against him; but no property being found, John Davis was summoned as garnishee. Judgment was given for Knapp & Shea for seventy-five cents, against the garnishee, Davis. Knapp & Shea appealed to the Circuit Court, where they obtained judgment against Davis for the amount of their judgment first obtained against Fleming. From this judgment of the Circuit Court, Davis appeals to this Court.

The answer of the garnishee, Davis, to the interrogatories filed before the justice, being decided to be insufficient by the Circuit Court, he again answered, that, "At the time of the service of the notice, he owed the defendant (Fleming) seventy-five cents, and no more, for labor done, which amount he had before tendered to the court, and asked to be discharged; and further stated, that he had not owed the defendant any other or greater sum since that time; that the defendant, Fleming, continued to labor for him after the notice was served, but required his wages weekly, in advance, which he had paid him all the time, in order to secure his services, and had not, at any time since the service of the notice, nor did he yet, owe the said defendant, Fleming, any other or further sum whatsoever," &c.

It appears, from the bill of exceptions, that the defendant moved the court to dismiss the case, because no certificate of the payment of the jury fees had been filed. This motion was overruled, and exception taken to the decision of the court.

On the part of the plaintiffs, Knapp & Shea, evidence was given, that Fleming, the defendant, was a hat finisher, and as such had been in the service of the garnishee, Davis, about the last of October, 1842, and continued in his service until the spring or summer; that Fleming's work was worth eight or ten dollars per week; that, on the 26th day of November, 1842, Davis came into the shop of the plaintiffs, where the witness was at work, and while there, Shea enquired of Davis how he had answered, and that Davis replied, that he had answered that he owed Fleming seventy-five cents; that he (Davis) paid Fleming his wages every Saturday; that [if] they had garnisheed him every week, they could have got their money.

Another witness, on the part of the plaintiffs, stated, that he was an apprentice of the plaintiffs; that he knew Fleming, and knew that he worked for said Davis at the time testified to by the last witness, and that his work was the finishing of hats; that he did not know the worth of Fleming's labor; that he was present at

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the conversation between Mr. Shea and Mr. Davis—heard Davis say that he paid Fleming every Saturday; that he (Davis) had answered that he owed Fleming seventy-five cents, and that was all he (Davis) owed said Fleming.

No other evidence was given.

The defendant then asked the following instructions:

1st, That the plaintiffs having denied the truth of the defendant's answer, it is necessary that they should show, by their evidence, that it is untrue; and if no such evidence is offered, they must find for the defendant.

4th, That if the defendant, Davis, paid Fleming for his labor weekly, in advance, he is not liable to the plaintiffs on account of such labor.

5th, That the mere fact of Fleming [being] in the employment of the defendant, is not sufficient to establish an indebtedness, as against the answer of the said defendant, Davis, without showing some other facts going to show such indebtedness.

The second and third are passed over, because the court gave them. The court refused the first, fourth and fifth instructions asked by the defendant, and gave the following: "The issue is indebtedness, and not the truth or falsehood of the answer. If the garnishee, after process served on him, pay the defendant, such payments do not extinguish the indebtedness, so far as this process is concerned: but being in fraud of law, the garnishee is liable to pay the plaintiffs, as though he had never made the payments to the defendant." The garnishee, Davis, excepted to the decision of the court, refusing to give the first, fourth and fifth instructions, and giving that last above-mentioned.

The errors assigned, and peculiar to this case are—

1st, That the Circuit Court ought to have dismissed the appeal for the reasons filed.

2d, That it erred in refusing the instructions asked.

3d, That it erred in giving the instruction of its own framing.

1. It does not appear on the record, that no certificate of the payment of the jury's fee had been filed. It is not stated in the bill of exceptions, that such certificate was not filed, but it is there stated that the defendant prayed the Circuit Court to dismiss the bill because none was filed, and the Circuit Court, for anything known by this Court, might have found such certificate on file. There is no error, then, committed by that court because it refused to dismiss the cause.

The first instruction prayed the Circuit Court to instruct the jury, that the defendant having answered the interrogatory on oath, it became the duty of the plaintiffs to prove the answer untrue, and if no evidence to that purpose is offered, they must find for the defendant. The 15th section of the act concerning attachments, page 86 of the Digest of 1835, gives the right to the plaintiffs to put the interrogatories to the garnishee, and if he fail to make full and direct answers on oath to the interrogatories, it is provided, by the 17th section of the same act, that the plaintiffs may take judgment against him by default or at the option of the plaintiff, &c. For what purpose could it be imagined that the law required the garnishee to answer such interrogatories? Surely not merely to satisfy the

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idle and impertinent curiosity of plaintiffs. But the answer of the defendant, plain common sense would say, is to be presumed true, until the plaintiffs proved it untrue; that is to say, until they prove that Davis owes Fleming more than seventy-five cents.

But the Circuit Court said, the issue is indebtedness, and not the truth or falsehood of the answer.

If that answer be true, then there can be no indebtedness of the garnishee to the defendant Fleming, more than is admitted. Then, if the question be, whether Davis be indebted or not? it is equally true that the question whether the answer be true or false amounts to the same thing.

Again, the Circuit Court, in answer apparently to the fourth and fifth instructions asked by Davis, says: "If the garnishee, after process served on him, pays the defendant, such payments do not extinguish the indebtedness, so far as this process is concerned: but being in fraud of the law, the garnishee is liable to pay the plaintiffs as though he had never made such payments to the defendant. The fourth instruction prayed the court to tell the jury, that if the garnishee paid said Fleming for his labor in advance, he is not liable to the plaintiffs on account of such labor. Now, if it be true that Davis paid Fleming in advance for his labor, in such case Fleming would be indebted to Davis, and not Davis to Fleming; for, in such case, the payment made to Fleming by Davis would give Davis a claim on Fleming for a week's labor, and not go to extinguish an indebtedness of Davis to Fleming. But to avoid giving this fourth instruction, the Circuit Court assumes the very thing to be decided, to wit, that Davis was indebted to Fleming. There certainly was evidence on which an instruction might be demanded. In the first place, the answer of Davis is to be taken as true, until the contrary is proved: and although the first witness of the plaintiffs, by his evidence, rather impeached the truth of the answer, yet if the fourth instruction had been given, the jury might have given more credit to the answer, than to the testimony of this witness. The testimony of the second witness of the plaintiff is no way inconsistent with the answer of Davis. He states, that Davis said he paid Fleming every Saturday; but whether he paid him the Saturday before or after the services rendered is not said, and we may as well presume that it was paid before as after the services rendered, for, in all probability, the plaintiffs did not interrogate this witness more closely because they apprehended the result would be unfavorable to them.

The fifth instruction asked was useless, if the fourth had been given. But it was so reasonable, that no reason can be seen why it was not given.

The authorities in *Sergeant on Attachments*, cited by Mr. Hickman for the defendant, are founded on Pennsylvania statutes, which are broader than ours, expressly render the garnishee not only liable for what is due at the time of service of the garnishment, but for what is owing at the time of the answer to the interrogatories. But this is not that case; the garnishee paid the debtor in advance, in order to secure his services, and no fraud on the law, nor any illegality, is seen in such a course.

The judgment of the Circuit Court is reversed, and the cause remanded.

Prather vs. McEvoy, to use of Nelson.

PRATHER vs. McEVOY, TO USE OF NELSON.

A note for a certain sum, "*to be paid in cut-stone work*," is a note for personal services, and not assignable.—See *Bothick's Administrator vs. Purdy*, 3 Mo. Rep., second edition, p. 60.

APPEAL from St. Louis Circuit Court.

JOHN B. KING, *for Appellant.*

1. It is alleged in appellant's bill, and admitted in the answer of said McEvoy, that the amount of said note was owing in stone work.

2. It is charged in said bill, that a demand was made on said McEvoy, for the payment of said note, and admitted in his, said McEvoy's answer, and that he did not, and would not, pay off said note when so demanded of him by said appellant.

3. It is charged in said bill, and admitted in said McEvoy's answer, that he, said McEvoy, was and had been insolvent; that a suit at law against him would be unavailing on behalf of the appellant.

4. The appellant being without relief at law, as here manifestly shown, is entitled to the relief he has sought in equity, or lose his debt coming from said McEvoy.

5. He was entitled to this relief in equity at any time before the money was paid on said execution and the execution returned.

6. Nelson has no interest in this cause so as to bar the relief sought by the appellant against the appellee, McEvoy.

7. It would be unjust and wrong in morals, that McEvoy should collect his judgment off appellant, and appellant lose his demand by said McEvoy's insolvency.

8. This is one of the apparent cases in which chancery has always granted to the suffering party, by this species of fraud practised by appellant McEvoy, relief in the way sought by the appellant in his bill; the appellant, therefore, prays for the relief sought in his bill, that the same may be extended to him, by this honorable Court, for the causes and reasons aforesaid.

HICKMAN, *for Appellee.*

1. No bill of exceptions has been filed in this cause, and therefore neither the motion to dissolve the injunction nor the evidence (if any was used upon the motion) has been preserved.—7 Mo. Rep., 224, 285.

2. By the showing of the appellant himself in his bill, it appears that the claim of McEvoy against him had been transferred to Nelson, and judgment obtained thereon for the use and benefit of Nelson, before any right of action accrued against McEvoy, on the note *for stone work* executed by him to Blount & Baker.—7 Mo. Rep., 598.

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3. The appellant made (as appears by his bill) his defence at law—first, before a justice of the peace; second, in the Court of Common Pleas; third, in the Supreme Court; in all of which he was unsuccessful: he then files his bill in chancery, asking to be allowed the same defence he had been refused at law, alleging the insolvency of McEvoy, which is denied in answer, and not proven. I contend, that, by his own showing, the appellant has no good defence to this claim either at law or in equity, and therefore the injunction was rightly dissolved.—See case between these parties, 7 Mo. Rep., 598.

NAPTON, J., *delivered the opinion of the Court.*

This was a bill in chancery brought by Prather, the appellant, to restrain the collection of a judgment at law obtained against him by McEvoy for about ninety dollars. It appears from the bill, that McEvoy, a stone mason, brought suit against Prather, for some stone work done for him, amounting to some ninety dollars, before a justice of the peace; that the defendant offered as a set-off against the account, a note given by McEvoy to Blount & Baker, in the following terms:—"Due Messrs. B. & B. the sum of eighty-four dollars, which is to be paid in cut-stone work.—St. Louis, March 19, 1840.—*John McEvoy.*" On which, was the following endorsement: "For value received, we assign the within to J. V. Prather.—20th March, 1841.—*Blount & Baker.*" The set-off was not allowed by the justice, and on appeal to the Court of Common Pleas, it was also excluded, and the judgment of the Court of Common Pleas was affirmed by this Court.

The judgment is now sought to be enjoined, upon the ground, that a demand has been made upon McEvoy, for stone work, to the amount of the note by Prather, and because of the insolvency of McEvoy.

In *Bothick's Administrator vs. Purdy*, (3 Mo. Rep., 82,) a note given for the payment of one hundred and eighty dollars in carpenter's work was held to be not assignable, it not being a note for money or property, but for personal services. The same doctrine is held by the Supreme Court of Kentucky, in the cases of *Halbert vs. Durigs*, (4 Litt. Rep., 9,) and *Henry vs. Hughs*, (1 J. J. Marshall, 454.)

We see nothing in the form of the present note to distinguish it from the one in *Bothick vs. Purdy*. Cut-stone work, like carpenter's work, might mean work finished and delivered at the shop, as well as work put up at the residence, or other place designated by the obligee. It is as much a contract for personal service in the one case as the other.

This view of the case prevents the necessity of alluding to the other grounds insisted on by the appellant.

The judgment of the Circuit Court is affirmed.

Guelberth vs. Watson & Hildeburn.

GUELBERTH vs. WATSON & HILDEBURN.

Where a promissory note is made payable "with the current rate of exchange on Philadelphia, when due," the amount due thereon does not appear upon the face of the note, and the court cannot assess the damages thereon after judgment by default, but must cause a jury to be empanelled for that purpose.—See Rev. Stat., 1835, title, "Practice at Law," art. 3, sec. 34, 35; *Farwell et al. vs. Kennett et al.*, 7 Mo. Rep., 595.

APPEAL from St. Louis Circuit Court.

CALLAHAN, for Appellant.

T. T. GANTT, for Appellees.

NAPTON, Judge, delivered the opinion of the Court.

Watson & Hildeburn filed, in the office of the Clerk of the Circuit Court of Saint Louis, two notes, of the following tenor:

"\$350 62-100.

"Saint Louis, June 24, 1842.

"Seven months after date I promise to pay to the order of Watson & Hildeburn three hundred and fifty dollars and sixty-two cents, for value received, negotiable and payable, without defalcation or discount, with the current rate of exchange on Philadelphia when due.

"AUGUSTE GUELBERTH.

"Due January 24th, 1843.—\$359."

The second note was for \$356 89, due nine months after date, and payable with the current rate of exchange on Philadelphia when due. The clerk issued a summons accompanied with a copy of the notes, which was duly served. At the return term, the defendant, Guelberth, appeared, and filed a motion to dismiss the cause; because—

1. It did not appear that the legal owners of the notes filed them.
2. It did not appear by whom the suit was instituted.
3. It did not appear that the legal owner instituted the suit.
4. Because no attorneys' names are subscribed to any of the papers.
5. Because it does not appear, from the notes, that the plaintiffs are the legal owners thereof, as mentioned in the writ.
- 6, 7, 8. Similar causes assigned.
9. Because the act under which suit was instituted is unconstitutional.

The motion to dismiss was overruled, and the case continued until the next term, at which time, no defence being made, and it appearing to the satisfaction of the court, from the notes, that the defendant was indebted to the plaintiffs in the sum of \$707 51, the court gave judgment for that amount, with damages, \$32 90, and costs. Afterwards, during the same term, the defendant moved to set aside the judgment, because—1st, The motion to dismiss was overruled;

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2d, The damages were assessed by the court; 3d, It was premature to give final judgment; 4th, The said cause was never docketed for trial; 5th, The proceedings were such as to preclude a trial by jury. This motion was overruled, and a bill of exceptions taken to the opinion of the court in overruling both motions.

This suit appears to have been instituted under the provisions of the act of Assembly of February 27th, 1843, and the objection to the proceedings on the motion to dismiss, we are of opinion, are unfounded.

A more serious objection to the action of the court is founded on its assessment of damages without the intervention of a jury. The 34th and 35th sections of the act regulating practice at law enact, that whenever an interlocutory judgment by default is entered in any suit founded on any instrument of writing, and the demand is ascertained by such instrument, the court shall assess the damages; in all other cases, the damages shall be assessed by a jury empanelled in the court for that purpose. (Rev. Code, 1835, p. 461.) The seventh section of the act to simplify proceedings at law, passed February 27, 1843, provides, that suits commenced under that act shall be proceeded in to final judgment, in the same manner as if commenced in the ordinary form, except where, in the act, it is otherwise provided. No provision is found in this act, altering the course to be pursued in judgments by default.

The question is, then, did these notes ascertain the demand on their face, or was there not a question of fact to be determined, before the amount due could be ascertained. The notes were payable in "the current rate of exchange on Philadelphia when due." What exchange on Philadelphia was worth in Saint Louis, when these notes became due, was a matter which could only be ascertained by a writ of inquiry; no information could be obtained from the face of the notes.

This case is, in principle, like the case of *Farwell, &c., vs. Kennett, White & Kennett* (7 Mo. Rep., 595), where it was held, that a bill payable in currency was not a liquidated demand, but required the intervention of a jury, to ascertain its value when the note was due. The rate of exchange, like the value of currency, fluctuates, and its value, at any specified point of time, must be ascertained, like any other question of fact, by a jury.

The court erred, therefore, in assessing the damages without the intervention of a jury, and the judgment is reversed, and the cause remanded.

Saint Louis Floating Dock Insurance Company vs. James G. Soulard.

ST. LOUIS FLOATING DOCK INSURANCE CO. *vs.* JAMES G. SOULARD.

1. A judgment of nonsuit cannot be entered against a plaintiff without his consent.
2. A note payable in property is admissible in evidence under the money counts.

APPEAL from the St. Louis Court of Common Pleas.

LEONARD and BAY, *for Appellants.*

1. A promissory note may be given in evidence, under the money counts, in an action by the assignee against the maker.—*Tatlock vs. Harris*, 3 D. and E., 174th American edit., 85; *Pierce vs. Crafts*, 12 Johns. Rep., 90; *Wild vs. Fisher*, 4 Pick., 421; *Ramsdell vs. Soule*, 12 Pick., 126; *Olcott vs. Rathbone*, 5 Wend., 490.

2. A note payable in property is admissible in evidence under the money counts.—*Smith, Administrator, vs. Smith*, 2 Johns. Rep., 235; *Crandal vs. Bradley*, 7 Wend., 311.

SPALDING and TIFFANY, *for Appellee.*

1. The nonsuit was right, as the note was not evidence under the common counts.—7 Mo. Rep., 595; 2 Phil. Ev., 15-19.

2. There is no sufficient reason assigned for setting aside the nonsuit. 1 Mo. Rep., 718: that it cannot be set aside on an insufficient reason alleged, though a sufficient one may exist.

3. No exception is taken to the act of the court, excluding the note from the jury, which it is presumed caused the plaintiff below to take a nonsuit, nor to the refusal to set aside the nonsuit; the only exception is to the *judgment*, which judgment is right.—7 Mo. Rep., 403; 5 Mo. Rep., 246.

TOMPKINS, J., *delivered the opinion of the Court.*

This was an action of assumpsit brought by the appellant against James G. Soulard, the appellee, on a promissory note made by the latter to one Julia Soulard, and assigned to the plaintiff. The note is as follows:

"Sixty days after date I promise to pay, to the order of Julia C. Soulard, the sum of eight hundred dollars in currency, without defalcation or discount.

(Signed)

"JAMES G. SOULARD."

The declaration contained a special count upon the note, and the common counts. The plaintiff, on the trial, withdrew the special count, and the corporate existence of the plaintiff being admitted, and the endorsement, &c., of the note proved, he offered it in evidence under the common counts. The defendant

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objected to the admission of the note in evidence under the common counts, upon the ground that it was payable in currency, and was not evidence under the common counts; "whereupon," says the bill of exceptions, "the court nonsuited the plaintiff;" to which judgment of the court the plaintiff excepted, and filed a motion to set aside the judgment of nonsuit, which motion was overruled. We are not told, in this bill of exceptions, that the court sustained the defendant's objection to receiving this note in evidence; but after that objection was made by the defendant, the court nonsuited the plaintiff, as it is stated, and we are left to conjecture that the court excluded the note, and ordered a nonsuit to be entered against the plaintiff because he did not prove his case.

In the case of *Welles vs. Gaty et al.*, decided at this term, the judgment of the Court of Common Pleas of St. Louis county was reversed, because that court directed a nonsuit to be entered against the plaintiff. In the case of *Barada et al. vs. The Inhabitants of Carondelet*, decided at this term, this Court decided, that the court of original jurisdiction had no authority to direct a nonsuit to be entered against the plaintiff. We have no record evidence whatever that the court decided this note not to be admissible in evidence under the common counts. This, however, may be the fault of the defendant, who neglected to except to the decision of the court, if, indeed, it did so decide. The 31st section of the act to regulate practice in the Supreme Court provides, that "no exception shall be taken, in an appeal or writ of error, to any proceedings in the Circuit Court, except such as shall have been expressly decided by such court." The proceedings to which exception was taken here, is the nonsuit. This, in all probability, was but the minor point; for the counsel have argued the case as if it appeared on record that the court had decided that this note is not admissible in evidence under the common counts. It is not easy to tell why that court assumed the power to direct a nonsuit to be entered, unless it acted under the impression that it had been decided that the note was excluded. It is not, certainly, expected that the court will, by way of argument, declare that the nonsuit was directed, because no evidence of indebtedness was produced by the plaintiff. But its decision, that this note was not admissible evidence in this case, if it had been spread on the record, would have shown to this court very plainly why the plaintiff, if he had considered the case doubtful, ought to have desired to submit to a nonsuit, and, indeed, to have prayed leave of the court to take a nonsuit, with leave to move to set it aside. But as this record now stands, this court cannot, consistently with the provisions of the said 31st section, decide any point, except the propriety of the order that a nonsuit be entered. But as this case may be brought before this court again, in order to save expense to the parties, it may not be amiss to say something concerning the admissibility of the note in evidence under the common counts. In *Crandall vs. Bradley*, 7 Wend., 311, it is decided, that a note payable in specific articles is admissible in evidence under the money counts. In accordance with this decision, this Court, in the case of *Austin vs. Feland et al.*, decided, that a debt payable in notes or accounts might be pleaded as a set-off against a note executed by the defendants. (8 Mo. Rep., 311.) But this Court cannot reverse the judgment of the Court of Common

Saint Louis Floating Dock Insurance Company vs. James G. Soulard.—Ferguson vs. Dent.

Pleas, because this Court was excluded from the jury, because it does not appear, on the record, that it was excluded; but we are left to conjecture that, by a decision of the court, it was excluded. The opinion, therefore, of the Court on this point may not have the same authority as if it were on a point which the record showed to have been decided by the court of original jurisdiction. This Court, however, reverses the judgment of the Court of Common Pleas, because it directed a nonsuit to be entered against the plaintiff.

The cause must be remanded.

FERGUSON vs. DENT.

In a deed of conveyance, a part of the land conveyed was described "*as lying west, and adjacent to the tract of land first above mentioned.*" Held, to be merely words of description, and not amounting to a covenant that the land did lie west, and adjacent to the land first mentioned.

ERROR to St. Louis Circuit Court.

GEYER and DAYTON, for Plaintiff in Error.

1. If it be said in a lease, that the lessee shall repair, &c., an action will be for not repairing.—3 Com. Dig., 237.
2. If a man assign an apprentice, though not assignable in law, it amounts to a covenant that the apprentice shall serve the assignee.—1 Lord Raymond, 683.
3. If land be conveyed, as bounded on the way on one side, this is not merely a description, but a covenant, that there is such a way.—Parker et al. vs. Smith et al., 17 Mass., 413.
4. The words being, "sound wind and limb, and free from disease," were held to amount to an express covenant.—Cramer vs. Bradshaw, 10 J. Rep., 484.
5. It is no answer to say that the situation of the land might have been known to the plaintiff. It would not avail the covenantor, if the covenantee had actual knowledge.—8 Mass. Rep., 146; 9 *Ibid.*, 495.

SPALDING and TIFFANY, for Defendant.

1. The words in the deed, assumed in the first breach to be a covenant, that the eighty acres lay west and adjacent to the other tract, were mere matter of description, and no covenant. (2 Johns. Rep., 37.) If a deed convey a lot containing 600 acres, with covenant of seizin, does not cover the quantity, and is not broken, if there be less than 600 acres. (8 Bing. Rep., 48; 21 Eng. Com. Law Rep., 217.) That words of description are not warranties. This was of a colt:

the court remarks, that, whatever a party warrants, he must make good; but if he sells by description, and a latent defect is discovered, the buyer must go farther and prove a scienter, in order to recover. (Greenleaf's Ev., 32.) Estoppel does not apply to that which is mere description in a deed, &c., such as quantity, whether arable or meadow, the number of tons, &c., as those are supposed merely incidental to the principal thing, and not "*to have received the deliberate attention of the parties.*" See, also, the note at same page; showing, that the reason is, that the *attention of the parties has been but slightly directed* to those matters. The same reason exists why words of description should not be construed into a covenant, that forbids their operating by way of an estoppel, viz., that the attention of the parties is but slightly directed to those matters.

2. Those words were not intended by the parties as a covenant:

1st, Because the statements are as mere matter of description, and not in the formal mode, usual in deeds, where covenants are intended.

2d, Because there is a covenant of general warranty in the deed, thus indicating, that the parties knew how to frame covenants, when they intended to have them.

3d, To hold these words to be a covenant, is *unprecedented and dangerous*.

1. Though deeds of land are among the most common transactions, and suits on the covenants in them frequent, yet no cases of suits, or similar claims of description are produced, except a single one in this Court.

2. If the suit can lie, then a suit can be sustained on every variance of description in a deed, from the fact: and thus conveyances will be converted into traps for the unwary. Nothing is more common than partial misdescriptions in deeds; thus, those portions of deeds on which little attention is usually bestowed, are converted into warranties. Hitherto they have been considered as mere description, in good faith, by the grantor of the land sold, and, if not fraudulently misdescribed, that he was not answerable. If, knowingly, he misrepresents, or misdescribes, he is liable for any injury done, as has been decided in *Pasley vs. Freeman*, 3 T. Rep, 51; a leading case, which has been followed in England and America ever since.—*Chandler vs. Lopes*, 2 Croke, James II.; and the note to these cases in *Smiths' Leading Cases*.

3. The only case I have seen, countenancing the doctrine contended for, is in 3 Miss. Rep., 578; *Campbell & Moore vs. Russell*. This case, as reported, discloses nothing on this subject. In vain will the reader seek for the remarkable doctrine, that *mere words of description of the land conveyed are covenants, are warranties*, on which the grantor is liable, if there be a mistake.

That case differs also from the present, as it appears from the deed itself, that the main motive of the purchase there was to secure to the grantee the very farm which he occupied, and thus, that the matter of description was a matter of substance, and not a mere incidental affair.

NAPTON, J., delivered the opinion of the Court.

This was an action of covenant, brought by the plaintiff in error upon a deed conveying to him certain tracts of land.

Ferguson vs. Dent.

By the deed from Dent and Wife to Ferguson, the grantors "granted, sold, aliened, enfeoffed and confirmed" to him a tract of land, lying in the State of Missouri, containing $125\frac{1}{16}$ acres, being the south-east fractional quarter of section No. 13, township 44, range 10 west, represented in said deed as having been entered by P. Dillon.

The deed further conveyed "another piece of land, being the unsold residue of a larger tract of land, of 160 acres, the said unsold residue hereby conveyed containing eighty acres; said larger tract being a location made by Dillon, under a New Madrid certificate, number 282, conveyed to him by Prior Quarles, who acquired it of Robert Simpson, to whom it was conveyed by the heirs and representatives of Eustache Peltier, the said eighty acres being an undivided interest, and lying west and adjacent to the tract of land first above-mentioned."

In conclusion, the grantors covenanted with the said Ferguson, his heirs and assigns, that he would forever warrant and defend the tracts of land above-granted, and every parcel thereof, unto him, the said Ferguson, his heirs and assigns, against all persons lawfully claiming the same, and against all titles, and liens, and incumbrances whatsoever.

The declaration alleged, that by said deed, Dent covenanted with the plaintiff, among other things, "that the said eighty acres of land, last above-mentioned and described, *lay west and adjacent* to the tract of land first in said deed mentioned; and that the said Dent and his wife were, at the time of the execution of said deed, seized of an indefeasible estate in fee simple in the real estate by said deed granted;" and assigned for breaches—*first*, "that the said eighty acres of land, last in said indenture described, *did not lie west and adjacent* to said tract of land first in said indenture mentioned, but lay in another and different direction from said tract, and in another and different place;" *second*, that Dent and wife were not seized of an estate in fee at the time of making the said deed in said lands, &c.

The defendant set out the deed, on oyer, and demurred generally, and the demurrer was sustained by the court.

The second breach assigned is conceded to be bad, as the words "granted, sold, aliened, enfeoffed and confirmed," do not imply a covenant of seizin, and the words from which, by our statute, such covenants are implied, are not used in the deed.

The only question is, whether the words of the grant, "the said eighty acres, being an undivided interest, and lying west and adjacent to the tract of land first above-mentioned," amount to an express or implied covenant, that the said eighty acres did lie west and adjacent to the said tract first conveyed.

This is a question upon which, undoubtedly, great regard should be paid to judicial precedent, if there be a continuous and decisive series of adjudications on either side of the proposition. It is emphatically important, that the construction of conveyances should be uniform, and it is of more consequence that the meaning of words and phrases (which, in themselves, fluctuate with the innovations incident to language,) should be consistent and fixed, than that their first interpretation should accord with reason, or conform to their ordinary acceptation.

It is plain, that the clause in this deed, which has been declared upon as a

the court remarks, that, whatever a party warrants, he must make good; but if he sells by description, and a latent defect is discovered, the buyer must go farther and prove a scienter, in order to recover. (*Greenleaf's Ev.*, 32.) Estoppel does not apply to that which is mere description in a deed, &c., such as quantity, whether arable or meadow, the number of tons, &c., as those are supposed merely incidental to the principal thing, and not "*to have received the deliberate attention of the parties.*" See, also, the note at same page; showing, that the reason is, that the *attention of the parties has been but slightly directed* to those matters. The same reason exists why words of description should not be construed into a covenant, that forbids their operating by way of an estoppel, viz., that the attention of the parties is but slightly directed to those matters.

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This is a question upon which, undoubtedly, great regard should be paid to judicial precedent, if there be a continuous and decisive series of adjudications on either side of the proposition. It is emphatically important, that the construction of conveyances should be uniform, and it is of more consequence that the meaning of words and phrases (which, in themselves, fluctuate with the innovations incident to language,) should be consistent and fixed, than that their first interpretation should accord with reason, or conform to their ordinary acceptation.

It is plain, that the clause in this deed, which has been declared upon as a

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covenant, is not an *implied* covenant. An implied covenant is an agreement raised by implication of law, between two or more persons, from certain technical expressions used in the deed. Selwyn's N. P., title, "Covenant." Thus, the word "do," or "give," in a feoffment, the words "give and demise," in a lease, and the word "enfeoff," in a lease for years, have all been, by the uniform determination of the courts, held to imply certain covenants. So, the words, "grant, bargain and sell," by express provision of our statute, imply certain covenants of seizin, freedom from incumbrance, &c. But neither by common law or statute, do the words, "*being or lying*," imply any covenant that the fact is as it is represented to be.

The question is, then, narrowed down to the single point, Is this an *express* covenant?

It is true, that no precise form of words is necessary to constitute an express covenant; any form of words, or mode of expression, in a deed, which clearly evinces an agreement, will amount to a covenant. (Selwyn's N. P., p. 343.) But it is well settled, that expressions in an instrument, which are mere *description*, do not constitute a covenant. No authority has been produced, and none, I apprehend, can be produced, in which any court has held mere words of description to constitute a covenant.

It must be admitted, that, in determining whether the clauses of a written instrument are matters of description only, or amount to a covenant, some of our state courts have gone very far in their construction of bills of sale of personal chattels, to confound all discrimination between matters of description and of agreement. The case of *Cramer vs. Bradshaw*, (10 Johns. Rep., 484,) cited by the counsel for the plaintiff in error, is an instance of this kind. The defendant bargained and sold to the plaintiff, "a negro woman slave, named Sarah, aged about thirty years, being of sound wind and limb, and free from all disease," and by the same instrument *covenanted* to warrant and defend the slave, so sold to the plaintiff, against the defendant, and all others. The court settled the point raised on this instrument in a few words. They declared, "The words in the bill of sale are an averment of a fact, and import an agreement to that effect. The words were not used as a mere description of the slave; they amount to an express, not an implied covenant; to a warranty of the soundness of the slave." Now, it is a little singular, that these words, "being of sound mind and limb," &c., were held an express covenant, when the vendor in the same instrument expressly covenanted for the title, and thereby indicated his knowledge of the apt phrases proper to express a warranty. Hence, in the case of *Saper vs. Breckenridge*, decided by this Court in 1835, (4 Mo. Rep., 14,) the authority of this case in Johnson is entirely disregarded, and the same, or similar expressions in a bill of sale, are construed as matters of description, and not of covenant. So, in the case of *Bacon vs. Brown*, (3 Bibb, 35,) and ——— (2 *Ibid.*, 616,) the Supreme Court of Kentucky considered such language in a bill of sale as mere representation, and not amounting to a warranty. The court relied upon the circumstance, that the writing contained an express warranty of title, as conclusive evidence that no warranty of soundness was intended. They suppose, if such a warranty had been

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intended, the warranty would have been so worded as to embrace both soundness and title. In accordance with these decisions in Kentucky and this State, is the case of *Budd vs. Fairmaner*, decided in the Court of Common Pleas, 8 Bing., 46. In this last case, the written instrument produced was a receipt, in the following words: "Received of Mr. Budd £10, for a gray four-year-old colt, warranted sound in every respect." The Court held the warranty to apply only to the soundness of the colt, and not to his age; considering the first part of the receipt was mere description or representation.

In the case of *Lanier vs. Auld*, 1 Murphy's Rep., 138, the defendant, in his written contract for the sale of a slave, warranted "the aforesaid slave to be sound and healthy," and the Supreme Court of North Carolina held, that the word "slave" was *descriptio personæ*, and that the writing contained no warranty that the negro was a slave.

These cases are referred to, not as decisive of the question under consideration, but with a view to show, that the difference of opinion among courts, as to what form of words constitutes mere description, and what will create a covenant, has been confined chiefly to informal instruments, transferring personal property; that the courts, in determining particular expressions in contracts of this character to be covenants, have done so upon the ground, that the words purport, in their estimation, an *agreement*, an express covenant, not an implied one; and that the words so declared to be a covenant are, *therefore*, not words of description.

In conveyances, the same diversity of opinion is not to be found. If we except the case decided in 1834, by this Court, which we shall advert to presently, we have not been referred to any case, (unless the case of *Parker and Others vs. Smith and Others* be such an one,) in which the descriptive part of a deed, whether relating to quantity or locality, has been construed as a covenant. In *Mann & Toles vs. Pearson*, (2 Johns. Rep., 37,) the Supreme Court of New York determined a question, arising on the construction of a deed, very analogous to the present. The defendant agreed to convey to the plaintiff "lot No. 78, in the township of Lysander, containing 600 acres;" and the question was, whether a deed, conveying lot No. 78 in the township of Lysander, which lot, in truth, contained but 421 acres, was a compliance with disagreement. The remarks of the Court, in determining the case for the defendant, will illustrate the views entertained by them relative to mere words of description in a conveyance. Judge Spencer, who delivered the opinion of the court, in which Judge Kent and Tompkins concurred, said: "The enumeration of quantity is not of the essence of the contract; it is a matter of description merely. The only certainty in the present case is the lot, and this alone is the subject of the covenants. The books afford very little information on this point. It may be observed, that there are no cases to be found which warrant this action, and though probably the case has not occurred in this State, it has in Connecticut. The Supreme Court of that State, in the case of *Snow vs. Chapman*, (1 Rovt., 528,) decided, that where lands were specifically bounded and described, and were stated in the deed to contain 110 acres, an action of covenant would not lie on the covenants of seizin, though in truth the quantity was only ninety acres; because the deed granted nothing but

the lands within the boundaries, and to those lands only the covenant related. I cite this decision as an opinion of a court of high respectability, proceeding upon the English Common Law in the case before them.*****I will only add, that in my own experience, and I may say with propriety, in the universal opinion of conveyancers, the enumeration of quantity, after a description of the subject, is superfluous and immaterial, and, in any view, only matter of description."

In accordance with the opinion of the Supreme Court of New York, is the opinion of the Supreme Court of Massachusetts, in the subsequent case of *Powell vs. Clark*, 5 Mass. Rep., 356. This was a conveyance of a tract of land, by designated metes and bounds, and representing the said tract as containing a certain number of acres, when, in truth, it did not contain the quantity represented. The action was brought upon the clause of the deed representing the quantity conveyed as a covenant; and the learned Chief Justice Parsons, in giving the judgment of the court, observed, "In a conveyance of land, by deed, in which the land is certainly bounded, it is very immaterial whether any, or what quantity is expressed; for the description by the boundaries is conclusive. And when the quantity is mentioned, in addition to description of the boundaries, without any express covenant that the land contains that quantity, *the whole must be considered as mere description*, although the quantity mentioned is an uncertain part of the description, and must yield to the location by certain boundaries, if there is a disagreement, whether the quantity mentioned is more or less than the quantity actually contained within the limits expressed. The covenants declared on, therefore, do not appear to have been made by the defendant, and the declaration must be adjudged bad."

These cases are sufficient to show the settled doctrines of the courts in relation to that part of a deed which purports to describe the quantity of land conveyed, and, in principle, no difference is perceived between descriptions of quantity and descriptions of locality. When a deed purports to convey land by metes and bounds, and describes the land as "containing so many acres," or as "lying west and adjacent to" another designated tract, it is not easy to see any reason why the words, "containing," &c., should be held words of description, and the words "lying west," &c., should be construed as a covenant. The one is as much matter of description as the other, and the purchaser may suffer as much inconvenience and hardship, by getting a smaller quantity of land than he was led to believe he had purchased, as by getting the same quantity in a different place. In either case, he relies upon his own knowledge of the situation and extent of the land he purchases; or, if ignorant of both, he can secure himself by express covenant.

The case of *Parker & Others vs. Smith & Others*, 17 Mass. Rep., 144, is relied upon as asserting a different principle. That was an action of trespass in the case for obstructing a way. The plaintiff derived title from one Russell, who, in the conveyance of the lot, described it as bounded south and west by ways or streets, and the deed expressly conveyed "a privilege in all the ways or streets that are or shall be laid out in the new settlement, to be used in common with the other owners of the lots," &c. The question was, whether those claiming under the

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grantor could be permitted to deny that the plaintiff's lot was bounded south and west by a street or way, and the court held, that the grantor and his heirs were estopped from denying that there was a street or way to the extent of the land, on those two sides. Judge Parker, in delivering the opinion of the court, said, "We consider this to be, not merely a description, but an implied covenant, that there are such streets." This is obviously a mere *dictum* of the learned judge, for it was not necessary to hold the clause of Russell's deed an implied covenant, in order that Russell, and all claiming under him, should have been estopped from denying what was represented in the deed. A grantor, and, in some cases, even strangers (*Carver vs. Jackson*, 4 Peters' U. S. C. C. Rep., 1,) may be estopped by mere *recitals* in a deed, and yet it does not follow that such recitals are covenants, express or implied. We do not consider this case as at all impugning the doctrine established by the same court, in *Powell vs. Clark*.

We come now to the case of *Campbell & Moore, administrators of Burnside, vs. Russell*, 3 Mo. Rep., 579, which is mainly relied upon as settling this question in favor of the plaintiff in error. The reported opinion of the court does not disclose anything at all inconsistent with what we suppose to be the settled doctrine in England and in the United States; but we have been referred, by the counsel for the plaintiff, to the record furnished from the clerk's office, as exhibiting the points made, and decided more fully than can be inferred from the printed decision. I have examined these papers carefully, and find the following to be the history of this case:—William Russell conveyed to Burnside four hundred arpens of land, "it being the same tract of land on which the farm now occupied by the said Burnside is situate, and which farm is principally, or entirely included in the boundaries of the said four hundred arpens, it being part of the settlement and improvement, right and claim of William Miller, which said Miller conveyed to the said Russell, by deed, bearing date, &c., and which said four hundred arpens is separate from the three hundred and fifty arpens of the same tract, (which said Miller had previously sold to Thomas Mason,) by a conditional and agreed-upon line, according to a plat of the said division, one copy of which plat is in possession of said Burnside, and another copy thereof of the said Thomas Mason, and the original with the said William Russell: to have and to hold, &c." The deed concluded with a covenant of general warranty.

The plaintiff assigned, as breaches of the covenant—first, that the tract of four hundred arpens of land so granted, &c., was not, and is not, the same tract of land on which the farm then occupied by the said James Burnside was situate, but another and a different tract, situate at another and different place; and that the said farm was not, and is not, principally or entirely included within the boundaries of the said four hundred arpens, but on the contrary thereof, the said farm was and is wholly without and beyond the said boundaries, and that the said tract of land was not, and is not, a part of the settlement and improvement, right and claim of William Miller, and that the said Miller had not conveyed the same to the said Russell, as in said covenant is supposed; and second, for breach of the covenant of warranty, that said Russell did not warrant and defend, &c., but on the contrary, the said land and farm, so as aforesaid granted, &c., did, at the date

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of said deed, appertain and belong to the United States of America, &c.; that the United States had conveyed to one Bennett, and that said Bennett had evicted the representatives of Burnside, by lawful title, &c.

To this declaration, the defendant pleaded fifteen pleas, on the first, second, fourth, eighth, thirteenth and fourteenth of which, the plaintiff took issue, and demurred to the third, tenth, eleventh, twelfth and fifteenth. The plaintiff replied specially to fifth, sixth, seventh and ninth pleas. The Circuit Court, considering the pleas demurred to as sufficient bar to the action, or rather considering the declaration insufficient, gave judgment for the defendant.

The case was first argued and determined at the June term of this Court, 1833, at which term the judgment of the Circuit Court was affirmed. The opinion delivered at that term is not published, nor is it preserved among the papers; but it would seem, from the petition for a re-argument, that the court had intimated, that these representations in Russell's deed, as to the locality of the land conveyed, were not covenants.

At the October term, 1834, the opinion of the court was delivered, and is as follows: "It being our opinion, that it is not a sufficient assignment of the breach of warranty, that the land, at the time of the execution of the deed, belonged to the United States, and that there are other breaches in the declaration well assigned, and the judgment of the Circuit Court against the plaintiffs being general, its judgment is therefore reversed, and the cause remanded."

As the only other breaches assigned in addition to the breach of general warranty, related to those clauses of Russell's deed which described the locality of the land, and his title from Miller, we shall not attempt to draw any distinction between that case and the present. In substance, they are obviously alike: though the case of *Campbell & Moore vs. Russell* presents a stronger appeal to the equitable feeling of a court, in principle, it must be admitted to rest upon no stronger grounds than the present. Upon principle and authority, we think we have shown that decision cannot stand, and it becomes important to inquire whether, under the circumstances, this Court should now adhere to it?

We are constrained to disregard this decision for the following reasons:

First: it is manifest, that this decision of the court, in *Campbell & Moore vs. Russell*, has had no influence upon the construction of conveyances in this State. As the decision touching the point in controversy was not published, no conveyancer could have been misled, and no deed could have been made on the faith of the construction given by the court to the terms of Russell's conveyance. There is, therefore, no principle of public policy which could induce this Court now to depart from the settled law of the land, because of any known innovation upon that law by previous adjudications.

Second: no reason or authority is given for the decision. From the very brief manner in which the case is disposed of, we might infer, that the mind of the court was not specially directed to a consideration of the sufficiency of the first breaches assigned in the declaration. Their attention would seem to have been chiefly directed to the pleas, some of which were considered bad, and others decided insufficient. Be this as it may, as highly as we respect the opinion of

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our predecessors, and disposed as we are to follow their lead on all doubtful questions, we do not feel bound to adhere to a decision which could have had no practical influence in our courts, or in the country, and for which no reason is given and no authority cited, and in opposition to which is found an unbroken current of decisions in other courts.

The other judges concurring, the judgment of the Circuit Court will be affirmed.

MULLANPHY, TO USE OF O'FALLON, vs. REILLY.

1. A. obtained judgment in the Circuit Court against B., who afterwards died leaving the judgment unpaid. C., his widow, in order to remove the supposed lien of the judgment from the real estate of B., executed her note to A. for the amount of the judgment, secured by a mortgage on her own real estate. A. accepted the note and mortgage in lieu of the judgment, and relying solely upon his new security, suffered the three years allowed for the presentation of demands against estates, to elapse, without presenting the judgment for allowance against the estate of B.

The only question presented was, whether the note and mortgage were given upon a sufficient consideration. *Held:* That the consideration was sufficient.

2. Any loss or injury sustained by a plaintiff, at the request of the defendant, forms a good consideration to support a promise to pay, provided the promise is fairly obtained.
3. A valuable consideration is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made.

ERROR to St. Louis Court of Common Pleas.

HUDSON and HOLMES, }
AND } *for Plaintiff in Error.*
LEONARD and BAY, }

POINTS AND AUTHORITIES.

1. The benefit accruing to the defendant, as a distributee of the estate, from the increase of the assets consequent upon the plaintiff's taking her note and mortgage in lieu of the judgment, and forbearing to present the same for allowance against the estate until it should be barred, was a sufficient consideration.—

1 Leigh's Nisi Prius, 27, and note (c) 28, 29; 2 Black. Comm., 445 (n. 8.)

2. The detriment to the plaintiff in abandoning his claim against the estate, and suffering his judgment to be barred by lapse of time, though no benefit whatever to the defendant, was a sufficient consideration to support this note and mortgage. (1 Leigh's Nisi Prius, 27; Halsar vs. Halsar, 8 Mo. Rep., 307; Pellaus et al. vs. Micross et al., 3 Burr, 1673.) "Any damage to another, or suspension or forbearance of his right, is a foundation for an undertaking, and will make it binding, though no actual benefit accrues to the party undertaking." (Yales, J.)

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Mr. Justice Wilmot's doctrine of *nudum pactum*, derived from the civil law in this case, is held erroneous in *Rann vs. Hughes*, (7 Term Rep., 350,) but the above point has never been questioned, it is believed; and it was expressly confirmed by *Ellenborough, C. J.*, in *Jones vs. Athburnham*, 4 East, 463. Demurrer to the declaration, which did not allege that there were any assets; that the defendant was administratrix, or that there was any person liable to the plaintiff, whom he could forbear to sue, or that there was any "fund which could be the object of suit." Dem. sustained. But when there is some object of right; some object of suit; some party, who, in respect of some fund, or some character known in the law is liable, then the forbearance is a sufficient consideration; so in this case. The evidence shows an estate with assets, there being at least some real estate. The forbearance of the plaintiff to pursue this fund was a detriment to him, though it should pay only one cent on the dollar. "If there be any consideration, the court will not weigh the extent of it." (*Leigh's Nisi Prius*, 26; 16 East, 372; *Phillips vs. Bateman*, 1 Saund., 2116, n. 2). Forbearance to sue an executor or administrator having assets is a sufficient consideration. (1 Saund., 210, n. 1.) The giving up of a suit when the law is doubtful is a good consideration. (*Longbridge vs. Darville*, 5 B. & A., 117.)

3. The burden of proof being upon the defendant to establish an entire want of consideration, she was bound to show, not only that the estate was insolvent, but that it could not have paid any thing upon the class of debts in which judgments were entitled to be placed.

4. The lien of a judgment upon real estate given by statute in this State is not lost by the death of the judgment debtor; and the discharge of that lien was a sufficient consideration to support this note and mortgage.

5. A note given by way of settlement, and to avoid the trouble, expense and risk of litigation, where the law is doubtful, and there is a difference of opinion, will not be held invalid for want of consideration. (*Longbridge vs. Dorville*, 5 B. & A., 117; 1 *Leigh's Nisi Prius*, 30; *Brown vs. Sloan*, 6 Watts, 421.)

6. Damage, trouble, inconvenience or prejudice to the promisee, constitutes a good consideration, as benefit to the promisor. (2 *Peters' Rep.*, 182; 5 *Cranch*, 142; 8 *Mass.*, 200; 6 *Mass.*, 58; 4 *Munf.*, 63; 2 *Johns. Cases*, 52; 1 *Conn. Rep.*, 519; *Chitty on Contracts*, 25; *Marks vs. Bank of Missouri*, 8 *Mo. Rep.*, 316.) Waiver of a legal right, at the request of another person, is a good consideration for a promise by him. (2 *N. H.*, 97; 4 *Pick.*, 97; 14 *Johns. Rep.*, 466.)

GAMBLE and BATES, for Defendant in Error.

1. There was here no consideration for the note.—*Chitty on Contracts*, 9; 3 *Pick.*, 83; 7 *Mass. Rep.*, 14.

2. All the instructions asked by the plaintiff, which assume that there was evidence that the note was taken in payment of the judgment against John P. Reilly, were properly refused, because there was no such evidence in the case, which could be left to the jury without misleading them.

3. All the instructions asked by plaintiff, which speak of the note as payment

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of the judgment, were properly refused; because they refer to the purpose of the defendant to pay the judgment, and do not depend upon the acceptance of the note as payment.

TOMPKINS, J., delivered the opinion of the Court.

This was a petition to foreclose a mortgage, by Bryan Mullanphy, suing for the use of John O'Fallon, executor of John Mullanphy, against Mary Reilly.

The Court of Common Pleas of Saint Louis county, in which the petitioner sued, gave judgment for the defendant; and to reverse that judgment, the petitioner, B. Mullanphy, sues out this writ of error.

The defendant pleaded *nil debit*, and gave notice, that, upon the trial, she would prove that the mortgagee gave no consideration for the making of the mortgage, and that he obtained the note from the mortgagor without consideration, and by imposing upon her erroneous belief that she owed the amount thereof, when, in fact, she owed him nothing. On the trial of the cause, the plaintiff gave in evidence the promissory note and the mortgage, of which, as no question is made as to their construction, nothing more will be said.

The defendant produced and examined, as a witness, Bryan Mullanphy, the plaintiff. He testified, that he had obtained a judgment against John P. Reilly, in his life-time, for about the amount of the said note, and that said Reilly died leaving said judgment unsatisfied; that the defendant in this case, the widow of the said Reilly, and Mr. Joseph Walsh, frequently said the judgment should be paid; and finally, the defendant, in order to lift the *cloud* or incumbrance of the judgment from the estate of the deceased husband, and in lieu of said judgment, and the lien which it was supposed to create upon the real estate of the deceased, gave the plaintiff this note and mortgage. It was supposed by the witness, that the lien of said judgment extended over some real estate of the deceased, and was not extinguished by his death. He did not tell them so, but spoke of it with Mr. Joseph Walsh, or perhaps both of them, as a disputed point; gave it as his own opinion that it was so. Walsh replied, by giving Mr. Gamble's opinion that it was not so, and said that he believed there was no lien or occasion to pay; that Mr. Gamble had told them so, but that the debt ought to be paid, and they would pay it. The witness thought they were not willing to risk the lien. Mr. Joseph Walsh was the person with whom the conversations were chiefly held; and finally, witness urging a settlement, and saying the widow might take her own time, the note and mortgage were brought to him by Mr. Joseph Walsh. When the note, which was payable in two years, became due, suit was brought. Mrs. Reilly sent for the plaintiff, and asked his advice, and wished to let judgment go, to save costs, but witness advised her not to do so, saying the land would sell low, and advised her to employ counsel, and make the best defence she could, and to gain time, when the property would probably sell better.

The witness farther testified, that he had never presented his judgment for allowance in the Probate Court against the estate, but suffered the three years' time allowed by law for the settlement of the estates of deceased persons to

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elapse, relying solely on said note and mortgage for his debt. This was all the testimony given in the cause.

The defendant then moved the court, in lieu of instructions, (the same being submitted to the court) to declare the law applicable to the case, arising out of the instructions, to be as follows, viz.: that if the evidence proves that the only consideration for the making of the note and mortgage, by Mary Reilly, was to satisfy a judgment obtained by the plaintiff, Bryan Mullanphy, against John P. Reilly, the husband of the defendant, in his life-time, this was not a consideration on which the said note and mortgage would bind the defendant. The court gave this instruction, and the plaintiff excepted.

The plaintiff then asked five instructions, four of which being nothing more than the negative of that given for the defendant, will be passed over; for if the court decided correctly in giving the defendant's instructions, it must have decided correctly in refusing those of the plaintiff.

The fifth instruction prayed by the plaintiff was, "That the said Mary Reilly had a right to pay her husband's debts, and to give a note for them, and that such a note is a sufficient consideration to support the mortgage." Undoubtedly, the defendant had a right to pay her husband's debts: but the question here is, not about her right to pay, but the plaintiff's right to recover; and as she does not wish to pay the debts, we are driven back to inquire, whether the note was founded on a good consideration, observing, that the court committed no error in refusing that instruction, as it is altogether immaterial.

The appellee made the plaintiff her witness, and he testified, that, relying solely on this note, and the mortgage for the security of the payment of the debt due from the deceased, he had never presented his judgment against the estate to the Probate Court for allowance. It may be said, then, that at the request of the appellee, the appellant lost his chance to obtain an allowance in the Probate Court, by failing to present it before his claim was barred by the statute. Any loss or injury sustained by a plaintiff, at the request of the defendant, forms a good consideration to support a promise to pay, provided that promise be fairly obtained, and not by fraudulent representations, &c.

A valuable consideration is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. (2 Kent's Comm., 465.) The question is this: Did Mullanphy make a misrepresentation of the law to the appellee, in telling her that his judgment, obtained against the deceased in his life-time, was a lien on the real estate after his death? It will be recollected, that he, at the same time, told her, that different lawyers entertained different opinions on the subject. This is a question not proper to be here investigated; but it will suffice to say, that this question has been argued before this Court, and has been kept under advisement since the last January term.

The note, then, to secure the payment of which the mortgage has been executed, seems to be for a good consideration, and consequently the court committed error in giving the instruction prayed by the defendant below, appellee here.

The judgment of the Court of Common Pleas must be reversed, and the cause remanded.

Steigers vs. Darby.

STEIGERS vs. DARBY.

A new trial will not be granted upon the ground that the attorney of the party was absent at the trial, being mistaken as to the time of the meeting of the court.

ERROR to St. Louis Court of Common Pleas.

BEATY, *for Plaintiffs in Error.*

1. The instrument sued on, given in evidence, shows that the issue of the plea of the statute of limitations ought to have been found for the defendants below, and therefore a new trial should have been granted.—Rev. Code, 1825, p. 510.

2. The transcript of the record in the case of plaintiff's testator against the same defendants was improperly admitted to be read to the jury, both because it is not relevant to any issue made up between the parties, and because it is incompetent, as being *recenter alias acta*, Francis Steigers, one of the defendants in this suit, not having been served with process, in the other.

3. The affidavit of defendant's attorney shows, that, by accident and innocent mistake of his, the defendants lost the benefit of a good defence, which they had to the plaintiff's action. For these reasons, a new trial ought to have been granted.

On the second point, see 1 Starkie, 217, that the parties to a judgment must be the same to make it evidence. And see 7 Mo. Decisions, 563, (*Stergens vs. Gross*,) that one named in the declaration as defendant, but not served with process, is not a party.

LEONARD and BAY, *for Defendant in Error.* *

1. The defendants did not object to any of the evidence introduced on the part of the plaintiff.

2. The motion for a new trial was properly overruled; because—

First, The defendants did not use diligence in attending to their defence.—2 Marshall, 253; *Stout vs. Calver*, 6 Mo. Rep., 254.

Second, The defendants have not set forth the facts which they expected to prove by their witnesses.—2 Bibb, 179; 3 Marshall, 166.

3. The plaintiff entered a remittitur for the whole amount of the credit claimed by the defendants.

NAPTON, J., *delivered the opinion of the Court.*

This was an action of debt, brought by Darby, administrator of Gross, against Matthias and Francis Steigers, founded upon a promissory note, executed by said defendants to Gross, for eight hundred dollars. The defendant, F. Steigers, pleaded—1st, A discharge under the insolvent laws of Maryland; 2d, Statute of

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Limitations. Matthias Steigers pleaded — 1st, The general issue; 2d, Set-off; 3d, Payment; 4th, Pendency of another suit in the same court, for the same cause of action; 5th, *Ne unques* administrator; 6th, Statute of Limitations.

Issues were made up on these pleas, and on 23d March, 1843, the cause was called for trial, and the defendants not appearing, the issues were submitted to a jury, who found for the plaintiff. On the 25th March, 1843, the defendants moved for a new trial, alleging, among other reasons, that the defendant's attorney was accidentally absent from the court when the cause was tried. In support of the motion, the affidavit of the counsel was filed, which stated that the case was called at an earlier hour than the trial docket was usually reached; that, without his knowledge, the court had adjourned to an earlier hour in the morning than usual; that he had been mistaken as to the time of meeting, &c., which it seems had been fixed by proclamation, a few days before the trial, at an earlier hour than, before that, it was held. The attorney also averred, that, in his opinion, the defendants could have established a good and meretorious defence against a large portion of the plaintiff's claim, to wit, the sum of \$324 59, for which receipts were retained; and that he believed that the defendants had a legal bar to the whole demand, under the Statute of Limitations, and that the defendant, Francis Steigers, had a further legal bar to the whole demand, by virtue of his discharge under the insolvent laws of Maryland.

The plaintiff's attorney entered a remittitur for the amount of \$324 59, the amount claimed in the affidavit of defendant's attorney, and the motion for a new trial was overruled.

The principal ground for reversing the judgment of the court below, is founded on the mistake of the defendant's attorney, in consequence of which he was not present at the trial. The opinion of this Court, in the case of *Stout vs. Calver*, (6 Mo. Rep., 254,) will show that the alleged reason is insufficient to authorize the interference of this Court.

As to the admission of the record of the former suit between these parties, from which it appeared that the case had been dismissed, we see no objection to it, as an answer to the plea of a suit pending for the same cause of action; besides, no objection was made at the trial.

Judgment affirmed.

Wells vs. Gaty, McCune & Glasby.

WELLS vs. GATY, MCGUNE & GLASBY.

The Court has no power to compel the plaintiff to submit to a nonsuit; he has a right to have the verdict of a jury upon the issues of fact.

ERROR to St. Louis Court of Common Pleas.

PRIMM, TAYLOR and LESLIE, for Plaintiff in Error.

The only question of importance presented by the record in the case, is the action of the court below in directing a nonsuit, when, from the evidence on trial, it appeared that the plaintiff's cause of action originated in a contract entered into by him and another.

The plaintiff seeks to recover, in common assumpsit, a sum of money received by defendants, in pursuance of a contract, to build a boat or part of a boat for him and one Wetmore, which contract was by the defendants abandoned, made null and void, or so neglected on their parts as to give plaintiff the right to rescind the same, either of which, as I conceive, presents the same question of law for the consideration of this Court.

The evidence shows, that the money paid the defendants on the contract was the individual money of the plaintiff, and the objection to his recovering it in this action is as ruled by the court below, that when defendants received it, it was received as the money of the plaintiff and Wetmore, and must, in law, be recovered back by a joint action.

The same reasoning that would support such a proposition would necessarily require a special action on the contract, either in covenant or assumpsit, according to its legal form. The contract being void, as to the right of the defendant to hold the money paid in pursuance of it, or, in other words, being no defence to a recovery, cannot, it would seem, govern as to who should sue, upon a point of non-joinder of parties plaintiff, without settling the law to be, that a special action on the original contract is the only legal remedy. This is contrary to all the decisions, and among many others, against the following: 2 Carr & Payne, 286; 4 Bing., 5; 12 Johns., 363, 274; 5 Johns. Reports, 85; 5 Mass. Reports, 199; 13 Mass., 139.

The nature of the action and the legal condition of the parties is changed from what they were under the original contract, and the law, and the reason of the law, says with clearness and simplicity to the defendant, you now hold the money independent of and contrary to the contract, and to the plaintiff's use, and he hath his plain action to recover it.

If plaintiff's co-contractor had actually paid a moiety of the money, he could, by separate action, recover it back.—6 Wend., 263.

Wells vs. Gaty, McCune & Glasby.

SPALDING and TIFFANY, for Defendants in Error.

I. On the case as made, it was right to instruct the jury that the suit should have been brought in the name of both Wetmore and Welles.

1. If there are *too many* or *too few* plaintiffs, it is a ground of nonsuit on the general issue. (1 Chitty's Pleadings, 5-9; 1 Bos. & Pul., 75, in notes; 2 Johns. Cases, 382; 6 Mass. Rep., 460.) "The want of proper parties in actions on contract is an exception to the merits, and to be taken advantage of on demurrer, in bar, and on the general issue, but not by plea in abatement."

2. The written contract was with Welles and Wetmore, as *party of the second part*, and the agreements to pay were by *them* as *one party*, and the promise to build the boat was *to them* jointly as *one party*; any suit, therefore, for the violation of that contract must have been brought by both jointly.

3. The payments made, to wit, the cash payment of \$1,000 made to the parties of the first and second part, and the second payment afterwards made, was in law a payment by the party of the *third part*, that is, by Welles & Wetmore, although, as between them, Welles may have raised the whole of the money out of his private resources. Suppose each had contributed a portion of *that* and the *subsequent payment*, would it have been the individual payment of each for his portion? It matters not how the receipt is written, whether in the name of one or both.

4. In bringing the suit now, to recover back the money paid, it is on the ground that the contract is rescinded; for if the contract were considered in force, the suit would have been upon *it*; and in suing on this contract, the action must have been in the name of Welles & Wetmore, joint covenantees.

5. If the contract be rescinded, an implied assumpsit is held by plaintiff to arise, to refund the money. But in whose favor does it arise? Does it arise in favor of the *party of the third part*, Welles & Wetmore, or does it arise in favor of Welles individually, for what he may have paid, and in favor of Wetmore, for what he may have paid?—and will the court enter into the state of accounts, between Welles & Wetmore, in this manner?

6. The money, when recovered, may not belong entirely to Welles; the proof is, that he was to advance money, and Wetmore contribute services. Suppose the contract rescinded by the fault of the defendants, is Welles to have back all the money advanced by him, and yet Wetmore to lose his services? And can Wetmore bring a suit individually, to recover for his services lost by rescinding the contract? On the contrary, are they not one party, (according as designated in the contract) and bound to sue and recover in their joint names, adjusting the amount of the recovery between themselves? They are *quasi* partners in this matter.

7. But the contract was not rescinded, and therefore Welles could not sue in this form of action; for, even admitting facts to have existed to authorize the contract to be rescinded, yet it has not, *in fact, been rescinded*. The defendants have not claimed to have it rescinded. Wetmore has not assented to have its being rescinded, and it is not in the power of *Welles* alone to rescind it; for, admitting (what is the law) that, in certain cases, *one party* can rescind a contract

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for the mal-conduct of the other, yet a portion of one party cannot rescind it. If the party of the third part might have rescinded it, in the present case, yet that party has not acted.—Chitty on Contracts, 275-7.

8. The party of the third part (Welles & Wetmore) were guilty of the first default, in failing to pay the instalment at the time, and this caused the delay in the work. It was not in their power to rescind the contract, even if they attempted to do so. (Chitty on Contracts, 275.) "The right to rescind a contract vests only in the party who has been guilty of no default." (*Ibid.*, 275.) "The right to rescind must be exercised in a reasonable time, and it can be exercised only when the parties can be put *in statu quo*." (Long on Sales, 238-42, &c.) Here Welles & Wetmore never rescinded the contract, never gave any notice that they intended to do so, but lay by and permitted the defendants to complete the work, and were themselves *the first to break the contract!* (3 Starkie on Ev., 1770.) That if party does not rescind contract, as soon as he is made acquainted with the reason and his right to do so, he is deprived of the privilege. In the case of defect in goods sold, he must do it after sufficient time allowed for examination and trial. (Long on Sales, 240.)

9. 7 Greenleaf, 70, *Brinley vs. Tibbets*: If party having right to rescind contract, because not performed in time, does any act amounting to an admission of its existence, he cannot afterwards elect to treat it as void. In the present case, the boat was to be finished by the 1st of June, and it was *after* that day when Welles paid the second instalment on the contract to the Dry Dock Company, which had been due ever since the 1st of March; thus acting on the contract after he knew the time was out for its fulfilment, and that the delay had been occasioned by his own breach of it.

10. To permit one of the two (either Welles or Wetmore) to sue alone, is subjecting persons in the situation of the defendants to be harassed by a multiplicity of suits. Suppose the company that engaged the building of the boat had consisted of ten instead of two persons, each, on rescinding the contract, would have a right to bring a suit in his own name for any amount he might have advanced for the common object.

11. To permit such suits, must lead to investigations not proper or competent for a court of law. How, in such a case, can a court of law ascertain how much each ought to recover? An account must be taken, and it must be ascertained how much each is entitled to, as between himself and his co-contractors he is entitled to receive; and in ascertaining this, an investigation must be had as to what each has contributed in money or services, &c., and, in fact, all must be done that is necessary in closing up a copartnership.

12. Whether the instruction given was right or not, can make no difference, as the plaintiff below was not injured thereby; inasmuch as the covenants in the instrument between the parties were dependent covenants, and the plaintiff, on his own showing, made out no case, and was not entitled to recover.—8 Mo. Rep., 487, *Freeland vs. Administrator of Thomas*.

II. The covenants being dependent, and the plaintiff having proved that he failed to keep *his*, it follows, of course, that he had no cause of action on account

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of the failure of the defendants to keep *theirs*, which failure was caused by plaintiff's own previous failure to perform a pre-requisite.

TOMPKINS, J., delivered the opinion of the Court.

This was an action of assumpsit, brought by Welles against Gaty, McCune & Glasby, on the common counts. The pleas were non-assumpsit, payment and set-off, with other special pleas not material to be noticed. The case was tried before a jury at the February term in the year 1844; judgment was given for the defendants, and, to reverse it, Welles prosecutes this writ of error.

The bill of exceptions shows that the plaintiff gave in evidence an instrument of writing to the following effect: "This article of agreement, made and concluded, at the city of St. Louis, the 4th day of February, in the year 1842, by and between Samuel Gaty, John S. McCune and Alban Glasby, of the first part; and William Thomas, Robert Walsh, John Daggett and John D. Coalter, doing business under the name of "The Dry-Dock Company," of the second part; and George Welles and Alphonso Wetmore, of the third part, witnesseth: that the said party of the first part, for and in consideration of the covenants and agreements hereinafter mentioned, do covenant and agree to and with the said party of the third part to furnish an engine of the following dimensions, &c. The said party of the second part, for and in consideration of the covenants hereinafter mentioned, do covenant and agree, to and with the said party of the third part, to build and furnish a twin ferry-boat, 90 feet long on deck, 13 feet beam, &c. And the said first and second parties do jointly agree with the said third party, that they will furnish said ferry-boat and engine complete, &c., by or during the month of May next. In consideration of which, the said party of the third part do covenant and agree to and with the party of the first part, to pay them thirty-two hundred dollars, as follows, viz.: four hundred and twenty-seven dollars, on signing this contract; four hundred and twenty-seven dollars on the first day of March next; eight hundred and fifty-three dollars on the first day of May next, or on delivery; and fourteen hundred and ninety-three dollars in four months after, &c. And the said party of the third part do covenant and agree, with the said party of the second part, to pay four thousand three hundred dollars, as follows, viz.: five hundred and seventy-three on the signing of this contract, five hundred and seventy-three on the first of March next, &c.

Evidence was introduced to prove the execution of the contract, and to show that the first payment was made by Wetmore out of money furnished him by Welles; and that Welles also paid the second instalment to the defendants; and that Wetmore had an interest in the boat, and was to advance no money, but to render services to Welles, in consideration that Welles advanced money. Other testimony was given, which it is not material here to notice.

After the testimony was all detailed in the bill of exceptions, it is added, "And thereupon the court directed a nonsuit to be entered in the case, upon the ground that the said Wetmore had not been joined as a party in the suit. Exceptions were taken to this decision of the court. The plaintiff moved to set aside the

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judgment of nonsuit; the motion being overruled, the plaintiff excepted to that decision also.

Where a plaintiff is demanded, and doth not appear, he is said to be nonsuit; and this usually happens where, upon the trial, and before his cause is finally submitted to the jury, the plaintiff discovers some error or defects in the proceedings, or is unable to prove a material point for want of necessary witnesses, &c., and thereupon being demanded, (as he must be) his default is recorded, &c. —5 Bacon, 140, title, "Nonsuit," letter A.

The court cannot compel a plaintiff to submit to a nonsuit; they may advise it, and direct him to be called, but if he refuse to suffer a nonsuit, the court can no otherwise protest and enforce their opinion but by awarding a new trial, if the jury find against their direction.—1 Washington, *Ross vs. Gill*; *Id.*, 138; *Thornton vs. Jett*, 2 Bin., 234; *Gerard vs. Gettig*, *Id.*, 248; *Widdefield vs. Widdefield*, cited in Bacon, at the aforesaid title, in a note.

Again, the plaintiff, in no case, is compellable to be nonsuited; and therefore, if he insist upon the matter being left to the jury, they must give in their verdict. (Tidd's Practice, 796.) The authorities cited, 3 Term Rep., 662; 1 Burrow, 338; Cowper, 483, and 2 Term Rep., 281.

The 31st section of our act to regulate practice in the Supreme Court directs, that no exception shall be taken in an appeal or writ of error, to any proceedings in the Circuit Court, except such as shall have been expressly decided by such court. No point of law has been decided in this case; but the judge of the court orders a nonsuit to be entered against the plaintiff, assuming, as we must suppose, the office of a jury as well as of a judge, whose duty it is only to expound the law arising on such facts as the jury may find from the evidence given in the cause. It might have been true, that if the law arising on the evidence given in the cause had been explained to the jury, they would have found for the defendants; but it was the part of the court to expound the law to the jury, and to have left them to say whether, on the evidence given in the cause, and the law as delivered to them by the court, the plaintiff could recover.

It was said in the argument, that the plaintiff took a nonsuit on account of the opinion of the court that Welles could not sue alone, but should have joined Wetmore as co-plaintiff. It appears on record, that the plaintiff came into court and said, he would not further prosecute his suit, but suffered the same to be discontinued; but it appearing, also, from the bill of exceptions, that the court ordered a nonsuit to be entered against him, and that he excepted to the action of the court in that matter, the entry that he suffered his suit to be discontinued must be regarded as compulsory, and made under the influence and in consequence of that order of the court. It is much easier to the court to direct a nonsuit to be entered against a plaintiff, than to explain the law to the jury, so as to enable them to find, under the directions of the court, whether, according to the evidence given, the plaintiff or the defendant ought to prevail. But the practice of directing the entry of a nonsuit, in cases like the present, leaves the law of the case all open for this Court to decide, and renders it impossible to comply with the requisitions of the 31st section, above cited.

The judgment of the court is reversed, and the cause remanded.

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FIELD & CATHCART vs. MATSON.

A judgment by default will not be set aside after the damages are assessed, on account of the mistake or negligence of the defendant's attorney. No distinction is made between the negligence of the party and the negligence of his attorney.

ERROR to St. Louis Court of Common Pleas.

LESLIE, for Plaintiffs in Error.

By the common law, it is in the discretion of the Court to set aside a judgment by default, on affidavit of merit, so that a term is not lost to the plaintiff. (Tidd's Practice, 507, 508; Graham's Practice, 634.) As the motion was made at the same term, this case would fall within the rule. The Supreme Court of this State seem so far to have modified the rule of the common law, as to require proof of reasonable diligence on the part of the defendant. The present case shows all the diligence that could be expected of a party: the defendants employed an attorney of the court to appear and defend; surely it would not be required that they should stand by him, and see that he did his duty. If there has been neglect, it is imputable only to the attorney, and it is confidently believed that neither in this State, nor elsewhere, can a case be found where the court have refused to relieve against a default incurred solely by the negligence of its own officer.

But it is submitted, that the case is not so much one of negligence as of accident. The confusion into which the business of the court had fallen through the sickness of the judge, and of the appointment of the attorney to a public duty, withdrawing his attention from the civil courts, are unusual circumstances, distinguishing this case from others: at least, it is conceived, these circumstances take away from the omission, on the part of the attorney, that character of gross negligence which alone could justify so severe a penalty as the payment of the judgment in this case.

It has been objected, that, by the statute, (p. 460, sec. 31,) the court has no power to set aside a default after the assessment of damages. It is true, that statute does not give the power. But it is insisted, that the power existed at the common law, and the statute being only in the affirmative, without negative or restrictive words, leaves the common law power unimpaired. In this respect, the language of the statute is plainly distinguishable from the statute regulating motions for new trials. In these last cases, (Statute, p. 469, sec. 1,) the language is, "All motions *shall* be made within four days." The decisions of the Supreme Court on this last statute, and on which the defendant in error is understood to rely, are therefore regarded as inapplicable to the present case.

The practice is believed to have been conformable to this construction, and in truth, upon the other construction, the courts would be wholly stripped of their

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power over judgments by default, in that large class of cases where the assessment is made by the clerk, and at the same time that the judgment is entered.

Finally, it is submitted, that this case is attended with such circumstances of accident and mistake as would justify the interference of a court of equity, on one of its common grounds of jurisdiction, and it is difficult to perceive any solid reason why it is not competent for a court of law to grant the same relief.

HUDSON and HOLMES, *for Defendant.*

1. A motion for a new trial must be made within four days after the trial.—Rev. Stat., p. 469, sec. 1.

2. A judgment by default may be set aside for good cause shown, at any time before the damages shall be assessed, but not afterwards.—Rev. Stat., 460, § 31.

3. After the damages are assessed, the judgment by default stands on the same footing with regard to a new trial as if rendered upon verdict, and a motion must be made, at least, within four days, for a new trial, if at all.—Wimer vs. Morris, 7 Mo. Rep., 6.

4. After the four days have elapsed, the court has no longer any power over the subject. (Rev. Stat., 460, sec. 31, 469, sec. 1; Williams vs. The Circuit Court of Saint Louis County, 5 Mo. Rep., 248; Allen & Dougherty vs. Brown, 5 Mo. Rep., 323.) In these cases, Edwards, judge, held, that the power of the court over the subject of new trials did not cease, but that, by virtue of common law powers, the subject might be considered at the suggestion of the party, if substantial justice had not been done, but not as a matter of right on motion. In this opinion the majority of the court do not seem to have concurred.

5. But even if the above doctrine be correct, it is clear, that if the new trial be refused, it is not error, but a matter wholly within the discretion of the court.—*Ibid.*, 254.

6. The plaintiffs in error did not use the diligence required by law.—Green vs. Goodloe, 7 Mo. Rep., 25; 7 Mo. Rep., 6.

TOMPKINS, J., *delivered the opinion of the Court.*

This was an action of assumpsit brought to the September term of the Court of Common Pleas of St. Louis county, for the year 1843, to recover the value of a slave alleged to have been lost through the negligence of the plaintiffs in error, whilst he was hired by them. Both of the defendants were served with the writ: neither of them appeared or pleaded to the action; and, on the nineteenth day of December, during the said September term of the year 1843, a judgment by default was entered against them, and a writ of inquiry was ordered to be executed at the next term of said court. Accordingly, at the April term then next succeeding, the writ of inquiry was executed, and the plaintiff's damages were assessed to six hundred dollars.

This writ was executed on the 4th day of April, and judgment was entered for that sum of money on the same day.

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On the 18th day of April, fourteen days after the entry of the judgment of the court for the damages assessed, the defendants filed their motion to set aside this judgment, and for a new trial, for reasons filed. The Court of Common Pleas overruled the motion; the defendants excepted; and, to reverse this judgment of the court, overruling the motion to set aside the judgment by default, this writ of error is prosecuted. The matter contained in the affidavits of the plaintiffs in error is, substantially, that they employed counsel soon after the service of the original writ, and that they are advised and believe they have a just and meritorious cause of defence, and believe that they can prove such cause.

The counsel employed admits that he was employed and promised to attend to the suit; that, at the return term of the cause, the sickness of the judge prevented the holding of the court until December, and then it was for a few days only; that he had neglected to place that cause on the private docket of himself and partner, and as his partner tells him, and as he verily believes, he did not inform his said partner that he had undertaken for them both to attend to the cause; that, being afterwards appointed circuit attorney, he was so employed in prosecutions, as to forget altogether the cause.

The 31st section of the third article to regulate practice at law provides, that, "If the defendant shall fail to file his plea or other pleadings, within the time prescribed by law, or the rules and practice of the court, &c., an interlocutory judgment shall be given against him by default; but such judgment may, for good cause shown, be set aside at any time before the damages shall be assessed, upon such terms as shall be just." But, on the part of the plaintiffs in error, it is contended, that the power existed at the common law, and the statute being only in the affirmative, without negative or restrictive words, leaves the common law power unimpaired. In Tidd's Practice, 507, 8, on which the plaintiff in error relies, it is said that a judgment by default may be set aside on affidavit of merits, so that a term is not lost by the plaintiff. This is, in effect, precisely the provision in our statute, as far as this case is concerned. Judgment by default was taken at the September term, 1843, and at the April term, 1844, the damages were assessed; so that *a term was lost* to the plaintiff below, before the damages were assessed. But it is contended, that the circumstances of the case take away from the omission, on the part of the attorney, that character of gross negligence which could alone justify so severe a penalty as the payment of the judgment in this case.

The cases of *Wimer vs. Morris*, 7 Mo. Rep., 6, and *Green vs. Goodloe*, p. 27 of same volume, show not only that there should be an affidavit of merits, but also, due diligence must be shown. It is in vain that it is attempted to make a distinction betwixt the negligence of the party, and that of the attorney. No authority is attempted to be shown for the distinction; and it is believed that business could not be conducted in courts on any other terms than of leaving the client to suffer the consequences of the neglect of his attorney.

The judgment of the court must be affirmed.

BARRET vs. BROWNING.

1. The eighth section of the act of February 27, 1843, "to simplify proceedings at law," requiring all special pleas, in actions on contract, to be verified by affidavit, applies to all special pleas filed after the passage of that act, although the suit may have been commenced before the passage of the act.

SCOTT, Judge, dissenting.

2. Where a vendor covenants to convey to the vendee, "by a good and sufficient warranty deed," the land sold, it becomes the duty of the former to tender the deed to the latter. The vendee is not bound to demand the conveyance before his right of action accrues on the covenant.

APPEAL from St. Louis Circuit Court.

CROCKETT and BRIGGS, for Appellant.

1. Barret's 4th, 5th and 6th pleas were good.
2. Barret's 2d and 3d pleas were good.
3. The demurrer to the replications thereto were good; but whether these pleas were good or not,
4. Barret's amended plea (7) was certainly good, whether sworn to or not, and should not have been stricken out.

The law is, that when a vendor is to execute a conveyance, the vendee should demand a deed, and after allowing a reasonable time to prepare a deed, must present himself to receive it.—3 Wendell, 249; 7 *Ibid.*, 129; 9 *Ibid.*, 68.

The case of *Rector vs. Purdy*, 1 Mo. Rep., 186, turned upon the peculiar phraseology of the covenant sued on: it was a covenant to "make, execute and deliver," &c. No such language is used in the covenant of Barret. In *Pye vs. Rutter*, 7 Mo. Rep., 548, the opinion of the court is substantially consistent with the cases we have referred to: the court says, "This is not an argument to convey upon request, or to convey generally, without specifying any time, but is an agreement to convey upon the performance of a particular act."

Barret's covenant specifies no day for performance, but is an agreement to convey generally, and hence other rules are prescribed to the covenantee for his government before he can have a cause of action.

This amended plea is accompanied by a profert of a sufficient deed, to satisfy the covenant with proper authentication; and even if technicalities could be urged against it, yet, if it contained a proper defence, it should have been received, and the other party left to make his exceptions to it in the usual way.

But it was not sworn to under the act of 1842-'3. It will be observed, that this suit was commenced, and most of the pleadings perfected, before the passage of said act; and we insist that this act should be construed as retrospective, and not to bear upon suits brought before its passage.

If the plea filed and stricken out was an amended plea, it certainly stands in

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the place and position of the pleading it proposes to amend, and in construction of law, is the original pleading itself. It is not an absolutely new plea, but an amendment merely.

Again, by our constitution, no retrospective law can be passed: art. 13, sec. 17. If this is a retrospective law, it cannot be enforced or sanctioned by the Court.

This provision of our constitution is not in any other, according to our recollection, and shows the sense of the legislature, as to the impropriety of depriving a party of any right or privilege conferred before the passage of the act. When suit was brought against Barret, he had a right to plead such pleas as this record contains, without affidavit, and of that should not be deprived.

This law is against the spirit of our constitution, and the genius of our institutions. A plaintiff is not required to swear to his declaration in covenant, and may harass a defendant with unfounded or stale claims, to his great injury and annoyance; but the defendant *shall*, nevertheless, swear to any special plea he may file, even to a swindling declaration. Is this the equality of privilege of which so much is boasted, and which is said to be guarantied to all, whether suitors or not—plaintiffs or defendants, and without respect to persons or positions? Is this "justice," in the most common acceptation of the term?

Legislatures are not infallible or omnipotent, and there is need that they should be admonished to that effect, by this Court, when necessary.

Again: if there is nothing objectionable on this score to the act aforesaid, yet, upon a fair construction of it, it does not touch this case of Barret.

The general issue need not be sworn to, with few, and perhaps (under the decision of this case, upon the plea of *non est factum*,) no exceptions.

In this action of covenant, there is no general issue upon the authority of all the books; and we insist, that such an action is not within the operation of the act concerning special pleas.

5. The court should have granted a new trial. The evidence is the covenant on the part of the plaintiff. For the defendant, it was proved, that Barret called on Blair, agent and attorney for Browning, and had a conversation concerning a conveyance, and while he did not actually tender a deed, Blair (according to witness' impression) declined taking a deed, and wanted a return of the money. Barret wished some time to prepare a deed, &c., and whether he was entitled to reasonable time, according to the tenor of the New York cases before referred to, or not, this amounted to a refusal of a deed by the agent, Blair, and Barret was without fault.

6. This is involved in the others, with this exception. If proferret and tender of a sufficient deed, or a sufficient sum of money, is made in court, and to the other party, *no matter in what way*, it is the duty of the court to make it effective. Now, whether this amended plea was sworn to or not,—whether it was a plea or not, it nevertheless was a proferret and tender of a sufficient deed to satisfy the covenant; and if he had a right to discharge it, as we insist, at that time, by making a deed, the court should have given judgment against Barret merely for costs, and ordered the deed into the possession of the other party.

THOMAS T. GANTT, for Appellee.

TOMPKINS, J., delivered the opinion of the Court.

This is an action of covenant, brought in the Circuit Court of St. Louis county, by John R. Browning against Richard F. Barret. Judgment was there given against Barret, and to reverse it, he appealed to this Court.

The declaration states, that the said Barret did, for the consideration of three hundred dollars to him paid by the plaintiff, covenant and agree, to and with the said plaintiff, to convey to the said plaintiff, by a good and sufficient warranty deed, a certain lot of ground described in said writing obligatory, as lot No. 4, in block No. 67, in the town of Warsaw, in the county of Hancock, in the State of Illinois. Yet the defendant, although often requested, to wit, at the county aforesaid, on the 1st day of February, 1842, and afterwards, to wit, on the 1st day of March, 1842, at the county aforesaid, hath not conveyed to the said plaintiff the said lot of ground in the said covenant mentioned.

To this declaration, the defendant pleaded *non est factum*, without an affidavit to support his plea.

2d. He pleaded, that he has been at all times ready and willing, and still is ready and willing, to convey, &c., the said lot of ground in the declaration mentioned, by a good and sufficient warranty deed, and herewith tenders to the plaintiff such a deed for the said lot, averring, that the plaintiff did not, at any time before the institution of this suit, request him to make such conveyance, &c.

3d. That before the institution of this suit, to wit, on the 1st day of March, 1842, he was ready and willing, and offered to convey to the said plaintiff the said lot of ground in the declaration mentioned, by a good and sufficient deed, &c., but that the agent and attorney of the said plaintiff refused to accept, &c.

4th. That the plaintiff did not, at any time before the institution of this suit, request the defendant to convey, &c.

5th. That when the plaintiff first requested the defendant to convey the said lot of ground, as in the declaration is alleged, the defendant did not refuse to make the said conveyance, &c.; on the contrary, the defendant was ready and willing to convey the said lot of ground, &c.; but the defendant did not and would not allow the plaintiff a reasonable time to have the said conveyance prepared, and did not afterwards, before the institution of this suit, again request the defendant to make the said conveyance.

6th. That when the plaintiff first requested the defendant to convey the said lot of ground, he did not refuse to make the said conveyance, on the contrary, the defendant was ready and willing to convey, &c.; but the plaintiff, after the lapse of a reasonable time for the preparation of the said conveyance, and before the institution of this suit, did not again request the defendant to make the conveyance, &c.

The plaintiff took issue on the defendant's first plea, and replied to the second plea, denying the defendant's readiness and willingness, as in that plea alleged.

The plaintiff replied also to the third plea of the defendant, denying that the defendant did tender to the agent of the plaintiff a deed for the said lot, as in that plea is alleged.

To the fourth, fifth and sixth pleas of the defendant, he demurred, and the defendant demurred to the plaintiff's replications to the second and third pleas of the defendant.

The Circuit Court, deciding the second and third pleas to be bad, overruled the defendant's demurrer to the plaintiff's replications to those pleas.

That court also sustained the plaintiff's demurrer to the defendant's fourth, fifth and sixth pleas.

On the 1st day of June, 1843, the defendant filed an amended plea to this effect, *viz.*, that he has at all times since the making of the said writing obligatory, been ready and willing to convey to the plaintiff the lot of ground in the declaration mentioned, &c.; and he herewith brings into court a deed of conveyance for the same, and offers the said deed for the acceptance of the plaintiff, averring that the plaintiff, at the time of the making of the said writing obligatory, was not, and from that time hitherto hath not been a resident of the State of Missouri, and had no agent in this State authorized to accept a conveyance, who was known to the defendant. He further avers, that the plaintiff did not at any time before the institution of this suit request the defendant to convey to him the said lot of ground, nor did he notify the said defendant that he was ready and willing to accept the said conveyance, &c. This amended plea was, on the motion of the plaintiff, stricken out of the record, because it was not verified by affidavit, according to the statute of the 25th February, 1843. The record states, that the cause being submitted to the court without the intervention of a jury, it found the issues made on the first, second and third pleas for the plaintiff, and assessed his damages, sustained by reason of the breach of the covenant in the declaration mentioned, to the sum of \$433 25, and gave judgment accordingly.

For what reason the court found the issues made on the second and third pleas, after they had been decided to be bad pleas, we are not told in the record.

Two questions present themselves mainly in this case for decision:

1st. Was this special plea, filed on 1st of June, 1843, after the act of 27th February, 1843, was in force, properly stricken from the record?

2d. Was it the duty of the plaintiff in this cause to demand a deed from the defendant?

1. The 8th section of the act 27th February, 1843, declares that, "Hereafter no special plea shall be filed in any action founded on contract, express or implied, unless such plea shall be verified by the affidavit of the defendant, or some person on his behalf."

It is contended by the defendant, that this suit being commenced, and most of the pleadings filed, before the act of 27th February, 1843, the act of 27th February, 1843, cannot be construed to apply to it, without giving to the act a retrospective effect. Ever since the year 1813, when the first legislative assembly met in the territory of Missouri, frequent changes have been made in the law regulating judicial proceedings, as it was, in those days of comparative simplicity,

called, and this is the first time that I recollect a question of this sort to have been brought to the appellate court. None, I suppose, ever was taken up, if otherwise, the untiring industry of the learned counsel would have referred to it, if in his favor. Indeed, I cannot say that, in my experience, I ever knew a member of the bar to refer a question of the kind to the Circuit Court for decision. Undoubtedly the act of 1843 could not be so construed as to deprive the defendant of any advantage he had gained before the passage of that act. For instance, if, before the passage of that act, he had pleaded a plea which he knew to be false, and which his conscience would not permit him to verify by affidavit, he could not be compelled, under the provisions of that act, to go back and verify the plea, although the false plea might greatly annoy the plaintiff. But, until it can be ascertained that a defendant ought, in justice, to be permitted to endeavor to evade complying with his contracts, by pleading pleas so destitute of truth that he is afraid to swear to their truth, it cannot be seen how the act can be called retrospective which tries to make parties speak the truth. It is to be hoped, that the legislative body, at its next session, will pass some other act to cause this to be more respected. The plea, then, filed as above-mentioned, was, as it seems, correctly ordered to be stricken from the record.

2. Was it the duty of the plaintiff in the cause to have demanded a deed from the defendant?

The defendant relies on three cases in the courts of New York, *viz.*: *Hackett vs. Huson*, 3 Wend., 249; *Connelly vs. Pierce*, 7 *Ibid.*, 131; and *Blood vs. Goodrich*, 9 *Ibid.*, 79. In those cases, it is said to be a rule which has obtained in that State, that the vendee shall demand the execution of a deed by the vendor, and that he shall prepare one for the vendor to sign, &c.

At an early period of our judicial history, the subject was before this court. The case is found in the first volume, at p. 186, *Rector & Jones vs. Purdy*. The declaration states, that the defendants, by their deed, covenanted to make, execute and deliver to the plaintiff a good and sufficient warranty deed for certain lots, upon the payment of the purchase money. The plaintiff ordered the payment of the purchase money, and assigned, as a breach, that the defendants did not make, execute and deliver a deed to him, according to the intent and meaning of their covenant, although he was then and there ready and willing to receive the same. To this declaration a demurrer was filed, and it was contended that the plaintiff should have averred in his declaration—1st, That he prepared and tendered to the vendors a conveyance ready for them to execute, at his own expense; and, 2d, That the declaration should state that he had demanded a conveyance from them. Judge Cook, delivering the opinion of the court, says, "In support of the first objection to the declaration, the plaintiff cited Sugden's Law of Vendors, 181, 2, where it is said, this point was so decided in a late case, in the Court of Exchequer, and that the decision was in conformity to the practice of the profession."

"Without investigating the propriety of this decision, under the circumstances which influenced the court in making it, we deem it sufficient that no such established practice of the profession, in conveyancing, prevails in this country. The covenant of the plaintiffs in error is express on their part, that they will make,

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execute and deliver a deed, &c., and common understanding would, perhaps, require something more than the practice of the profession to warrant such a construction of this stipulation as the plaintiff in error contends for.

"The better rule seems to be, that he who, in general terms, covenants to do a particular thing, shall be held to perform his covenant without the aid of the covenantee, unless such aid be indispensable to the performance; and this appears to have been the law upon the point before the late decision in the Exchequer. Upon the second point, we also think that the demurrer was properly overruled."

In this case there was no demurrer to the declaration. So much has been extracted from the case decided by our own courts, because it was thought appropriate to the case now before this Court, and to have been expressed in very clear and forcible language. But Mr. Crockett, for the plaintiff in error, contends, that this case of "*Rector & Jones vs. Purdy* turned upon the peculiar phraseology of the covenant sued on: it was a covenant to make, execute and deliver, &c." The only peculiarity in this covenant, as it seems to me, is, that it appears to have been written by a man that understood his business, and one who wished to leave no room for dishonesty to raise a quibble. Every conveyancer knows, that no instrument of writing becomes a deed until it is delivered; and it is equally implied in the covenant sued on, in the case now before this Court, that the vendor is to make, execute and deliver, &c. In consonance with the decision in *Jones & Rector vs. Purdy*, is a still later decision of this Court, in *Pye vs. Rutter*, 7 Mo. Rep., 548. In both of these cases, the vendor was to convey, on the performance of a particular act, *i. e.*, payment of the consideration, and it was held that the vendor must take notice of the performance of the act. In the present case, the price of the lot was paid at the time of the making of the covenant; and most certainly the vendor is bound to take notice that he has already received the vendee's money, and that if the vendee did not sue him immediately, it was because he voluntarily omitted to exercise his right. In 1 Sugden, 246, it is said, that at common law it is incumbent on the vendor to prepare and tender a conveyance where the simplicity of that law reigned; but upon the modifications of estates being introduced, which were unknown to the common law, and which brought with them all the difficulties surrounding modern titles, it became necessary to make an abstract of the numerous instruments relating to the title, for the purpose of submitting it to the purchaser's counsel; and it then became usual for him to prepare the conveyance. In a note to these observations, found in *Snyder*, (note 159) it is said, that the law in Pennsylvania is different. In *Sweitzer vs. Hammond*, 3 Sar. & Rawle, 228, where the vendor covenanted, that, upon payment of purchase money, he would give a title to the purchaser; held, that he was bound to prepare and tender a conveyance: "It is evident," said the chief justice, "that what may be a very convenient practice in England, may be very inconvenient *here*." It, then, at common law, by the decision of our own courts, as well as those of Pennsylvania and of England, in earlier days, was the duty of the vendor to prepare and tender a deed, and he having failed to do this, the vendee had a right to sue. In the case cited from our own reports, the deed was to be made on the payment of the purchase money, and here the purchase money

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was paid before the execution of the instrument of writing sued on; so that the defendant was, from the moment of delivering that writing, liable to be sued. But a court of equity would, perhaps, have restrained, for a reasonable time, the plaintiff, on good cause shown. But there is another defect common to all the defendant's pleas, except the amended plea, so correctly rejected. In no one of them has the defendant made profert of a deed for the inspection of the Court; but, in each plea, it is left for the jury to decide if the deed be good and sufficient. That profert should have been made of the deed, see 1 Bibb, 283, *Lock vs. Knowles*, and 3 Thomas' Coke, 370.

The judgment of the Circuit Court is affirmed.

SCOTT, J., *dissenting*.

I am not satisfied that the Court acted properly in striking out the plea. To apply the statute of 27th February, 1843, to this case, would be to deprive the defendant of the option, which the law gave him, to plead specially, and verify his pleas, or to plead the general issue, and give notice of the special matter of defence. As to the objection, that in covenant there is no general issue, and therefore a party could not have any option, the plea of *non est factum*, though not in strict legal acceptation a general issue, yet, under the late statute, in an action of covenant, it must be so regarded. A statute exactly similar to ours, in force in the State of Ohio, has received a like interpretation. (*Granger, Administrator, vs. Granger*, 6 Ohio Rep.; *Concier vs. Graham*, 1 Ohio Rep.) As I do not think the plea would have availed the party anything, I am in favor of affirming the judgment.

BUNDING & ENGEL vs. BLUMENTHOUS.

Where replications are filed at a subsequent term of the court, although without any objection, the defendant is entitled to a continuance.

APPEAL from St. Louis Court of Common Pleas.

G. W. CALLAHAN, for Appellants, by A. BEATY.

The appellant's pleas not having been answered, they might consider them as confessed, and could not be prepared to sustain them. It operated, therefore, as a surprise, to compel them to go to trial.—See 1 Mo. Rep., *Resher vs. Thomas*, p. 739; and 4 Mo. Rep., *Dempsey vs. Harrison*, 270.

TRUSTEN POLK, for Appellee.

1. The replication to defendant's plea of set-off, though filed out of time, was yet filed without objection by appellants, and before any motion was made by them for a nonsuit or continuance. Then it was too late to move that the plaintiff be *non pros.'d*, after the traverse was filed.—See *Magahan vs. Orme and Speers*, 7 Mo. Rep., 4.

2. The court below did right to refuse the appellants a continuance. By the statute, (Code of 1835, p. 460, sec. 32,) all that the defendant can ask, in case plaintiff fails to file his replication to defendant's plea in due time, is judgment of *non pros.* against plaintiff; he cannot ask a continuance for such failure. In this case there was no affidavit, or any other cause shown for continuance, except the filing the replication out of time. The statute taking away the ground last referred to, and there being no independent ground shown for the continuance, by affidavit or otherwise, the court had no alternative but to overrule the application, and to proceed with the trial. There was not even grounds laid for the exercise of judicial discretion in the case. It was not claimed that there was any surprise. And even in the case of an amendment of the record, the Court will not grant a continuance for that reason, unless the amendment was such as to produce surprise to the opposite party.—See *Jones vs. Cox and Others*, 7 Mo. Rep., 173.

3. The court being justified, as appears from what is stated above, in proceeding with the trial, the testimony offered by plaintiff below was sufficient, not merely to authorize the court to render a judgment in his favor, but to lay it under a legal necessity to do so. The counsel for appellee respectfully submits to the Court, in this case, that he is entitled to ten per cent. damages upon the amount due him in this case.

NAPTON, J., delivered the opinion of the Court.

This was an action by petition in debt, the writ being returnable to the February term, 1843. At that term, the appellants pleaded *nil debit*, and a set-off. The cause was set for trial on the 12th March, 1844, but was not reached until the 13th; on the morning of that day, plaintiff filed replications, and the defendant afterwards, (and without having objected to the filing of the replications,) moved the court for a continuance, for the reason, that said replications were filed out of time. The court refused to grant the continuance, and gave judgment for the plaintiff. The error complained of, is the refusal of the court to grant the continuance.

The cases of *Risher vs. Thomas*, (1 Mo. Rep., 740,) and *Dempsey vs. Harrison & Glasgow*, (4 Mo. Rep., 270,) cited by the appellants, we consider conclusive of their right to a continuance, under the circumstances.

In those cases, where a party had abandoned an issue in law, on the day set for trial, and amended his pleadings, by leave of the court, so as to put in issue the merits of the cause, the opposite party was held entitled to a continuance: to force the party into trial, under such circumstances, was considered a surprise

Bunding & Engel vs. Blumenthous.—State vs. Sterling.

upon him, as he could not be presumed ready to establish an issue in fact not presented by the state of the pleadings.

In the present case, the defendants could not anticipate that replications would be permitted out of time; and though the court undoubtedly had the power to grant such indulgence, a similar indulgence should have been extended to the adverse party, who, seeing his pleas unanswered, it is to be presumed, did not come prepared with proof to establish them.

The failure of the defendant to object to the replications, when they were filed, or his laches in not moving for a judgment of *non pros.*, on the 12th, might constitute a very good reason why the defendant should have been precluded from insisting on such a judgment, on the 13th, when the cause was called; but neither of these could deprive him of his right to a continuance, if he desired it.

Judgment reversed, and cause remanded.

STATE vs. STERLING.

ERROR to St. Louis Criminal Court.

LESLIE, *for Plaintiff in Error.*

BLENNERHASSETT, *for Defendant in Error.*

NAPTON, J., *delivered the opinion of the Court.*

The defendant was indicted at the November term, 1843, of the St. Louis Criminal Court, for vending lottery tickets, in the Missouri State Lottery for St. Louis Hospital. The indictment contained three counts. To this indictment there was a general demurrer, which was sustained by the court. To reverse this judgment, the State has sued out her writ of error.

No objections are perceived to the form of the indictment, and none have been suggested. It is presumed, from the brief of the circuit attorney, that the demurrer was sustained on the ground that the act of the Legislature of this State, of December 19th, 1842, declaring the sale of lottery tickets illegal, is unconstitutional and void. This question, so far as it is presented by the demurrer, has been considered and determined, in the case of *Freleigh vs. The State*, decided at the present term.

The judgment of the Criminal Court is reversed, and the cause remanded.

Kennerly vs. Martin.

KENNERLY vs. MARTIN.

A promise by the wife, after the death of her husband, to pay a bill for medical attendance upon the family of the deceased during his life-time, is not founded upon a good consideration, even though a part of the bill was for attendance upon the wife, and slaves, her separate property.

APPEAL from the St. Louis Court of Common Pleas.

SPALDING and TIFFANY, for Appellant.

1. The record from the Court of Probate ought to have been admitted as evidence for the defendant below, because it could properly have been proved a true copy by oral testimony, and because it was relevant testimony.—1 Starkie's Ev., 155; Peake's Ev., 28, 29; Roscoe's Ev., 54; 1 Phillips' Ev., 309. These references show, that a sworn copy of a record was admissible evidence before the jury in the present case.—6 Mo. Rep., 501, *McKinney's Administrator vs. Davis*. This case shows that the allowance of the demand in the County Court was a *judgment*, and had all the legal consequences of a judgment of a court of record, and was a bar to any other suit for the same, and therefore was legal testimony.

2. The instructions asked by defendant below ought to have been given, for the widow is not liable for the debts of the husband, even on an express promise to pay them, unless there be a good consideration for that promise, and the promise itself be in writing.—Chitty on Contracts, 6, 7; Comyn on Contracts, 8-10; 7 Term Rep., 350, note A, as to consideration; Rev. Code, p. 117, sec. 1, that an assumpsit to pay the debt of another must be in writing.

3. The instruction given was wrong; it assumes that the plaintiff's services, for which he sued, were rendered to the *defendant personally, and to her slave*, in the husband's life-time, and then declares it to be law, that the subsequent promise bound her; whereas there is no proof that the services were rendered to *her* or to *her slave*, but, on the contrary, were rendered to the husband; and even had the proof been that the services were rendered to *her personally*, yet the claim for compensation would have been a debt of the husband.

POLK, for Appellee.

1. The instruction given by the court to the jury on the trial of this cause, was the correct law of the case.—5 Taunt., 36, (1 Eng. Com. Law Rep., 10); 1 Chitty's Pleadings, p. 66, side-paging.

2. The Court of Common Pleas did right to refuse to give the instructions prayed by defendant's counsel on the trial of the cause.

3. The court below, in excluding from the jury the writing offered by defend-

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ant, purporting to be a copy of a judgment of the County Court, fell into no error that ought to be sufficient to reverse the judgment of that court.

4. The judgment of the court below ought not to be reversed because that court overruled the defendant's motion for a new trial.

NAPTON, J., *delivered the opinion of the Court.*

This was an action of assumpsit, brought by appellee, to recover the amount of a medical bill, and the plaintiff had a verdict and judgment for \$118 53.

Upon the trial, a bill of particulars was furnished by the plaintiff, consisting of items of medical attendance, medicine and professional services, from the 21st of August, 1839, to January 18, 1841. Of this amount, \$99 accrued in the life-time of James Kennerly, the husband of Eliza M. Kennerly, the defendant. It appeared, that so much of the bill as consisted of items for services rendered in the life-time of James Kennerly had been presented to the County Court, and allowed against the estate of said Kennerly. The professional services charged against the defendant in the bill of particulars, which had been rendered in the life-time of James Kennerly, were services rendered to the defendant herself and two slaves. James Kennerly died in August, 1840, insolvent.

After the death of James Kennerly, a collector of the plaintiff called on the defendant (Mrs. Kennerly) with two bills for medical services, embracing not only the services rendered since the death of Kennerly, but medical attendance upon Mrs. K. during her husband's life-time, and upon her daughters. The bills were left at her house. Shortly afterwards, the collector called for payment, when the defendant told him to call on Mr. F. W. Risque with the two accounts, and he would settle them, he being her agent, or attorney.

The defendant, upon this testimony, asked the court to instruct the jury, first, that they should exclude from their consideration all items for services rendered during the life-time of James Kennerly; and, second, that the defendant was not liable, upon any promise, to pay the debts of James Kennerly, unless made in writing. These instructions the court refused to give, but instructed the jury, — "That if they believed, from the evidence, that the defendant, after the death of her husband, expressly promised to pay the plaintiff for services rendered to her personally, and to her slaves, they should find for the plaintiff, although such services were rendered in the life-time of her husband, and were charged for in a bill presented against his estate."

Exceptions were taken to these instructions, and a new trial moved for, on the ground that the court had misdirected the jury, but the new trial was refused.

The only question is, whether these instructions are right.

There are cases in which a moral obligation has been considered a sufficient consideration to support a subsequent express promise to pay. (*Lee vs. Mudge-ridge*, 5 Taun., 37; *Barnes vs. Headly*, 2 Taun., 134.) In such cases the promise must be unequivocal, and the declaration must set forth all the circumstances, showing that the money is in conscience due; or, where such minuteness may not be required by the form of action, they must, at least, be established by proof.

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(*Littlefield's Executors vs. Shee*, 2 Barn. and Adolph., 811.) In this last case, Lord Tenterden observes, "That the doctrine that a moral obligation is a sufficient consideration for a subsequent promise, is one which should be received with some limitation."

In the present case there was no moral obligation whatever on Mrs. Kennerly to pay a debt contracted during her husband's life-time. It is clear that the professional services rendered the defendant personally, during her husband's life-time, constituted a debt against him; and so much of the instructions of the Court of Common Pleas as authorized a recovery for such services, was obviously wrong. The latter part of the instructions, which allows a recovery for services rendered her slaves during the life-time of her husband, might, under a different state of facts, receive some countenance from the case of *Mudgeridge vs. Lee*; but, upon the case made out, was clearly erroneous. It is distinguishable from the case of *Mudgeridge vs. Lee* in several essential particulars.

In the case cited, a *femme covert*, having a large estate secured to her separate use by marriage settlement, gave a bond for the repayment, by her executors, of a sum of money advanced at her request. After her husband's death, she wrote to the obligee, promising that her executors should pay this bond. This promise was made with a knowledge of all the circumstances. The bond given by her was void, nor did it constitute any debt against her husband or his estate; but the money having been advanced to her upon the faith of her separate estate, and she having solemnly promised, under seal, to pay it, there could not well be conceived a case of stronger moral obligation.

In the present case, there is no proof of any separate estate of the wife in slaves or other property. True, it might possibly have been inferred, from the husband's insolvency, and the fact that the widow still continued to hold slaves, that she had a separate estate in these slaves, to whom the services were rendered; but the inference is, at best, a forced one; and if such was the fact, it was capable of plain proof.

Had it been proved, it would not, however, alter the case. Services rendered to these slaves, though the separate estate of the wife, would still be the husband's debt, unless under special circumstances. It cannot be pretended that the mere fact of the wife sending for Dr. Martin made *her* responsible for the bill. In such cases the wife merely acts as agent for her husband.

Nor would it seem that Mrs. Kennerly considered herself responsible, or that the physician trusted to her responsibility. On the contrary, he presented the bill against the estate of J. Kennerly, and it was allowed. The idea of the widow's responsibility appears to have been an after-thought, suggested by the insolvency of Kennerly's estate.

Had Mrs. Kennerly been possessed of slaves to her separate use, not subject to the control of her husband, and sent for Dr. Martin to attend these slaves, and at the time promised him to pay for such services; and had the doctor performed the services on the faith of such promises, knowing at the time that the husband was insolvent, it would have been like the case of *Lee vs. Mudgeridge*. The moral obligation upon Mrs. K. might have supported a subsequent promise.

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The case of Littlefield's Executors *vs.* Shee is much more analogous to the present. In that case, the action was brought to recover for butcher's meat supplied to the defendant, for her own use, whilst her husband was abroad. After her husband's death, defendant promised to pay the debt when it should be in her power, and her ability to pay was proved at the trial: yet it was held, that the defendant having been a femme covert at the time when the goods were supplied, her husband was originally liable, and the price constituted a debt against him; the plaintiff was therefore nonsuited.

Judgment reversed, and cause remanded.

TAYLOR *vs.* RUSSELL.

Where a cause is submitted to the court, sitting as a jury, the parties must, in order to avail themselves of error in the court, separate the matters of law from the matters of fact, and call the attention of the court expressly to the point or matter to be decided.

APPEAL from St. Louis Court of Common Pleas.

SPALDING and TIFFANY, for Appellant.

1. The notice was insufficient to charge the defendant below.—Story on Bills, p. 451, sec. 382; *Ibid.*, 316, sec. 289; 2 Hills' N. Y. Rep., 587; Story on Bills, p. 316, sec. 289; 10 Johns. Rep., 490, Ireland *vs.* Hip.; 5 Martin's Rep., (new series,) 359, 137; 6 *Ibid.*, 506; 3 Little's Rep., 498, Bank of Logan *vs.* Butler.

CROCKETT and BRIGGS, for Appellee.

TOMPKINS, J., delivered the opinion of the Court.

This is an action commenced in the Court of Common Pleas of St. Louis county, by Samuel Russell, against William C. Taylor, on a note made by one Charles Learned, payable to the order of said Taylor, and by him endorsed to said Russell. The plaintiff, having first proved the handwriting of the defendant, proved that, on the day the note became due, it was duly presented for payment at the office of the Saint Louis Perpetual Insurance Company, where it was made payable, and that payment was refused; and that, on the morning of the day following that of the presentment and refusal, he left a notice of the dishonor of the note in the post-office in the city of Saint Louis, addressed to the defendant, who lived about four miles in the country, but was in the habit of receiving his letters at Saint

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Louis from the post-office there, which was the post-office nearest to the defendant's residence. This was all the evidence offered by the plaintiff. The defendant proved his residence in St. Louis township. The court, sitting as a jury, found for the plaintiff; whereupon the defendant moved for a new trial, for the reasons following:—Because the verdict was against law, against evidence, against the weight of evidence, and against the law and evidence.

It is assigned for error—1st, That the declaration is not sufficient in law for the appellee to have and maintain his aforesaid action; 2d, That the judgment was rendered in favor of the appellee when it should have been in favor of the appellant; 3d, That the court gave wrong instructions in favor of the appellee; 4th, That the court refused to give instructions asked for by the appellant; 5th, That the court refused to set aside the verdict, and grant a new trial, as moved for by the appellant; 6th, That the court admitted improper evidence on behalf of the appellee; 7th, That the court refused to admit evidence on behalf of the appellant.

By the 31st section of the act to regulate practice in the Supreme Court, it is provided, that "No exception in an appeal, or writ of error, shall be taken to any proceedings in the Circuit Court, except such as shall have been expressly decided by such court."

In the present case there has neither been a demurrer to the declaration, nor a motion in arrest of judgment, and yet we are called on to say that the declaration is not good. There was, indeed, a demurrer to the first count in the declaration, as originally filed; that demurrer was sustained, and the plaintiff, by leave of the court, filed an amended count to which the defendant pleaded, and he has brought up in this record the first count thus demurred to, and his demurrer, as a part of the record of this suit. It is to be wished that the legislature would enable the court to sentence the counsel, for such acts, to pay treble costs, as their clients generally are blameless. All the material parts of the bill of exceptions has been copied, and it does not appear that any instructions were asked either by the plaintiff or defendant; nor does it appear that any evidence introduced by the plaintiff was excepted to by the defendant, nor that any offered by the defendant was rejected by the court. The suit is founded on a note admitted in evidence by the court, without any objection by the defendant. The verdict, then, is not against evidence. The new trial ought not to have been granted them on that account. In *Polk vs. The State*, this Court say, that, "In all cases where the matters of fact and law are submitted, the parties must separate the matters of law from the fact, and have the opinion of the court on the points of law: then it can be seen on what ground the court decided the case. But in this case, if there be any error at all, we cannot know whether in law or in fact; and if in law, it is but fair that the court should have had its attention expressly called to the point." (See 4 Mo. Rep., 549.) In the case cited, the Circuit Court sat, too, as a jury; it is therefore immaterial whether there be a jury, or whether the court sit as a jury: in either case, the court must have its attention expressly called to the points of law to be decided.

The judgment of the Court of Common Pleas must be affirmed.

BASKERVILLE vs. CHILDS.

Where the plaintiff suffered the term at which the pleas were filed to pass without filing replications, and after the lapse of twenty-five days in the succeeding term, judgment of *non pros.* was entered against him, the court properly refused to set aside such judgment, no good cause for the failure of the plaintiff to file his replications being shown.

APPEAL from St. Louis Court of Common Pleas.

G. W. GOODE, *for Appellant.*

GEYER and DAYTON, *for Appellee.*

1. The judgment of *non pros.* was regularly entered, for good cause apparent on the record.—See Rev. Code, 1835, p. 460, sec. 32.

2. No good cause was shown for setting aside the judgment: the affidavit of Mr. Goode is not a part of the record, and if it can be taken notice of, furnishes no apology for neglecting to reply for an entire year.

3. The rule No. 22, set forth in the bill of exceptions, applies to a case where a replication has been filed out of time, but before judgment, and before the cause is called for trial, and to that case only.

4. Although the bill of exceptions states, that one of the reasons assigned for setting aside the judgment was, "that the replication had been offered to the court, to be filed on the day after said motion for a nonsuit had been made, and before judgment of the court given, but by the court rejected," there is no evidence of the fact stated, and the reasons filed under the rule assign no such reason.

TOMPKINS, J., *delivered the opinion of the Court.*

George D. Baskerville brought his action in the Court of Common Pleas of St. Louis county, against Samuel A. Childs, to the February term of the year 1843. At that term, the defendant demurred to the declaration, and his demurrer being overruled, he obtained leave to plead, and at the same term, to wit, on the 24th day of April, he filed his pleas to the merits. To these pleas, the plaintiff filed no replication, either at that term, or at the September term of said year. At the February term, 1844, to wit, on the 2d day of March, 1844, the defendant procured a judgment of *non pros.* to be entered up against the plaintiff, because he had not replied to the pleas of the defendant.

The 9th section of the third article of the act to regulate practice at law, p. 458 of the Digest of 1835, provides, that replications shall be filed within thirty days after the commencement of the term at which the defendant is bound to appear.

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It was more than thirty days after the commencement of the return term before the defendant had filed his pleas. The plaintiff having taken no step to hasten him, it must be presumed that he assented, and the necessary consequence would be that the plaintiff, if he wished, would have a continuance until the September term; for even if there were a rule of the Court to the contrary, it is not to be presumed that the defendant would enforce it, the action being for a money demand. The September term passed, and no replication being filed, the defendant, as above stated, at the February term of the year next ensuing, to wit, of the year 1844, on the 2d day of March, took this judgment. The plaintiff moved to set aside this judgment of *non pros.*, but the court overruled his motion, and to reverse the judgment of the Court of Common Pleas, overruling his motion, he relies on a rule of that court, set out in the bill of exceptions. This rule having no manner of application to the subject, will not be commented on. The longest time the plaintiff could reasonably claim to file his replication would not have been beyond the first day of the next term, after the defendant had filed his pleas; and he took not only that time, but the whole term, and about twenty-five days in the next term thereafter. But the plaintiff also caused an affidavit to be filed. It is not considered proper to notice this affidavit, even if it contained matter in excuse of the plaintiff's negligence; for it is not set out in the bill of exceptions. It will suffice for this case to say, that the 32d section of the third article, above cited, authorizes the judgment of *non pros.* in such cases.—P. 460 of the Digest of 1835.

The judgment of the Court of Common Pleas is affirmed.

WALKER vs. BANK OF THE STATE OF MISSOURI.

1. Notice of non-payment or non-acceptance of a bill of exchange must, in general, come from the holder, and should be given by some servant or agent who will be competent to prove the notice.
2. A notice not signed by any person is insufficient.
3. The endorsement of a note by an endorsee to the Bank of the State of Missouri *prima facie* vests the property in the note in the bank, and raises the presumption that the note was discounted by the bank.

APPEAL from St. Louis Court of Common Pleas.

GAMBLE and BATES, for Appellant.

1. The Bank was not entitled to recover on the evidence given:
First, Because there was no legal evidence that the note had been discounted at the bank.

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The fact, if it had existed, would not have been a substitute for diligence against the maker, unless the note had been made and endorsed for the purpose of being so discounted; but whether such be the law or not, there was no evidence here of the fact.

Second, Because there was no legal notice, or waiver of notice.

The notice proved is the deposit of a note in the post-office, not signed by any person, and not professing to come from any person; there is no evidence of any notice in any other form.

A notice is regularly to come from the holder, or from some person entitled to call for payment, or the agent of such person. (Bailey on Bills, 248; Glascock vs. Bank of Missouri; Glasgow vs. Pratte, 8 Mo. Rep., 336.) The books are full of this.

A notary public who has the note for the purpose of presentation and notice, may give the notice.—Bailey on Bills, 250.

A notice from a stranger is insufficient.—Story on Bills, 454.

Here is a case in which a paper, not professing to come from any particular person, is the only notice: this cannot be sufficient.

3. The court ought to have granted a new trial: this brings the whole case, in this form, to the consideration of the Court.

HUDSON and ROMYN, for Appellee.

1. The notice given in said cause, by the notary, was insufficient and informal.

2. The defendant below could not be made liable as endorser, until the remedy had been exhausted against the maker of the note.

The counsel for the defendant in error insist that the notice was sufficient. The object of giving notice to endorsers was attained in this case on this point.—See Bailey on Bills, edit. of 1836, p. 355; 1 Peck's Rep., 401; 2 Hawk., 560.

3. The note in question having been discounted at the bank, it thus became an instrument in the hands of the Bank, on which that institution might sue any party to it, in the same manner as if it had been a bill of exchange.—See Bank charter, Session Acts 1836-37, sec. 29, p. 19; 9 Cranch Rep., 9; Bailey on Bills, 261, 493.

It is no excuse for the endorser to say, that he did not know, at the time of endorsing a note, that it would be discounted at the bank, and he rendered liable before exhausting the remedy against the maker. The charter of the Bank is a public act, and the law by which every person must be governed, and every person who endorses a note must take the risk that the same will be discounted at the bank; and no private arrangement between the parties should affect the rights of the Bank when a note may be discounted by that institution.

TOMPKINS, J., delivered the opinion of the Court.

This was an action of assumpsit, brought in the Court of Common Pleas of St. Louis county, by the Bank of the State of Missouri, against John K. Walker,

Walker vs. Bank of the State of Missouri.

as endorser of a note made by William Carr Lane, payable to Walker's order. Judgment was given for the plaintiff, to reverse which Walker appeals to this Court.

The note was read in evidence by the plaintiff. It is in these words:

"Four months after date, I promise to pay to the order of John K. Walker, at the Bank of the State of Missouri, in the state of Missouri, two hundred and fifty dollars, without defalcation, and for value received.

(Signed)

"WM. CARR LANE."

It was endorsed—"Pay to the order of Thornton Grimsley—

"JOHN K. WALKER."

"Pay to the Bank of the State of Missouri—THORNTON GRIMSLEY."

The plaintiff then produced Andrew Elliot as a witness, who testified, that he was a notary public, and, as such, made the protest of the said note, which protest is set out in the bill of exceptions; and that, on the day of the protest, he presented the said note for payment, as in the protest is stated, and that he gave notice of the dishonor of the note to the defendant, by putting notice thereof into the post-office at St. Louis, addressed to the defendant, on the same day with the making of the protest. A paper being shown to the witness, which paper will hereafter be set out, he testified, that the paper thus shown to him was the notice put into the post-office by him; and he further stated, some days after the protest of the note, he met the witness in the street of St. Louis, and was asked by the witness if he had protested a note on which he (the defendant) was endorser? and being told that he had, the defendant produced to the witness a paper recognized by the witness as the notice of the protest, and asked him if he intended that as a notice of the protest? The witness answered in the affirmative. The protest was given in evidence. The notice was also given in evidence, and was in the common form. It was subscribed as follows:—"Your obedient servant, ———, notary public;" and directed to John K. Walker, near St. Louis, Mo. The name of the notary was not subscribed to the notice, but the place for his name was left blank. No objection being made to the notice except the want of a signature, it is not set out here.

The defendant, after the evidence was closed, moved the court to decide (the cause being submitted to the court) that the plaintiff could not recover in this action. The court refusing to make this decision, the defendant excepted. After verdict for the plaintiff, the defendant moved the court to grant a new trial; because—1st, The verdict is against evidence; 2d, It is against law; 3d, It is without sufficient evidence; 4th, The suit is on an endorsed note, against Walker as endorser, and the only evidence of the non-payment of the note by the drawer is, that the notary who protested the note sent the defendant, through the post-office, the form of a notice, without signature. The Court overruled this motion, and the defendant excepted.

The appellant makes these points:

1. That the Bank was not entitled to recover on the evidence given; 1st, Because there was no legal evidence that the note was discounted at the bank; and, 2d, Because there was no legal notice, or waiver of notice.

Walker vs. Bank of the State of Missouri.—Swearengen & Bredell vs. J. & B. Orne.

1st. The 29th section of the act to charter the Bank of the State of Missouri, p. 19 of the Session Acts of 1836-37, provides, that "All bills and notes, whether under seal or not, at any time discounted by the said bank, shall be, and are hereby, placed upon the same footing as foreign bills of exchange, so that the like remedy shall be had for the recovery thereof, against the drawer or endorser thereof; and with like effect, except so far as relates to damages." The form of this note shows, that it was made for the purpose of being discounted; or it may be said, at least, that if it had been made with an intention of getting it discounted, it would have been made in the form in which it here appears: it is endorsed by Walker to Grimsley, and by Grimsley to the Bank. This endorsement gives the Bank, *prima facie*, the absolute property in the note; and he who seeks to divest this *prima facie* title, must produce evidence for that purpose. The appellant has produced no authorities to maintain his position, and none can be expected or required to prove that this endorsement does *prima facie* give the Bank the right of property in this note.

2d. Was the notice of the dishonor of the note sufficient?

Notice of non-payment, or non-acceptance, must, in general, come from the holder of the bill or note, and it should be given by some servant, or agent, who will be competent to prove it. To the same purpose, two cases decided by this Court—*Glasgow vs. Pratte*, 8 Mo. Rep., 337, and *Glascock vs. Bank*, 8 *Ibid.*, 444. The notice proved, in this case, to have been put in the post-office for Walker, was not signed by any person; then it was given by no person, either principal or agent.

The judgment of the Court of Common Pleas is reversed, and the cause remanded.

SWEARENGEN & BREDELL vs. J. & B. ORNE.

1. Where a declaration contains a special count on a promissory note, and the common counts, and judgment is rendered for the plaintiff, it is immaterial whether the note sustains the special count or not, as it is admissible under the common counts.
2. Where it is apparent that a party has sustained no injury from the instructions given, and that judgment has been rendered for the right party, it is immaterial whether the instructions were erroneous or not.

APPEAL from St. Louis Court of Common Pleas.

GAMBLE, BATES and POLK, for Appellants.

J. B. KING, for Appellees.

Swearingen & Bredell vs. J. & B. Orne.

NAPTON, J., *delivered the opinion of the Court.*

J. & B. Orne sued the appellants, in an action of assumpsit, upon a note for \$933 32, and recovered judgment.

The declaration contained a special count upon the note, in which it was averred, that the defendants, by one Samuel A. Coale, made their certain promissory note in writing, &c. The common money counts were added. The defendants pleaded—non-assumpsit, payment, accord and satisfaction, and the Statute of Limitations.

The note offered in evidence upon the trial, and proved to have been executed by the defendants, was signed, "Swearingen and Bredell, *per* Samuel A. Coale."

The plaintiffs below composed the firm of J. & B. Orne, and, in 1839, an agent of this house received of Swearingen, on the defendants, several notes, signed by John Riffin, and endorsed by T. J. Payne, which notes, when paid, were to be in full satisfaction of the note sued on, and others, with the collection of which he was entrusted.

At the time this arrangement was made with Swearingen, the firm of Swearingen & Bredell had been dissolved, and Swearingen alone was entrusted with the business of settling the concern. Nothing was realized from the notes of Payne & Riffin.

The court instructed the jury, "that there was no evidence in support of defendant's pleas, of accord and satisfaction, and payment." It seems, from the bill of exceptions, that, in the argument addressed to the jury, the counsel for the defendants, notwithstanding the instruction of the court, contended, that the facts sustained the pleas of accord and satisfaction and payment, or at least sustained the same defence upon the general issue; whereupon the court again instructed the jury, that "there is no evidence before the jury of the discharge of either of the defendants from the debt, evidenced from the note read to them." The first instruction was excepted to, and after verdict for the plaintiffs, the defendants moved for a new trial, which was not granted.

It is insisted that the court erred—

First, in permitting the note of Swearingen and Bredell to be given in evidence under the special count; and,

Second, that the instructions were improperly given.

The averment is, that the *defendants*, (*i. e.*, E. Bredell & J. T. Swearingen) by one Samuel A. Coale, executed their certain promissory note for, &c. The objection is, that it did not aver that said defendants were parties in trade, and executed the note as such, under the style of "S. & B." It is admitted, that the note was evidence on the money counts, and it is not perceived very material whether the note would sustain the special count or not.

But, as it is apparent that the defendant has sustained no injury by the instructions, the verdict and judgment being obviously for the right party, the judgment is affirmed.

LITTLE & NOECKER vs. NELSON.

Where a cause is submitted to the court, sitting as a jury, and no exceptions are taken to the evidence when it is offered, and the court is not called upon to decide any point of law, the judgment will not be reversed for error in law or fact.

APPEAL from St. Louis Court of Common Pleas.

PRIMM and TAYLOR, for Appellant.

1. It is respectfully submitted, that the St. Louis Court of Common Pleas committed error in overruling the appellant's motion for a new trial, for the reasons embodied in that motion, applying the law to the facts contained in the record.

2. Where a note is made by a tradesman, payable in clothing or specific articles, and the same does not express the *time* or *place* of payment, it is obligatory on the payee to make a demand for the same, at the place of business of the tradesman or payor, before he can convert his demand into money, and then only when he shows, on the trial, that a refusal attended such demand—the *onus probandi* being on the payee.—See Chapman on Contracts, p. 28, and following; Martin vs. Chauvin, 7 Mo. Rep., 277; Cornelius vs. McDonald; republication of Mo. Rep., vol. 2, p. 46, and authorities therein cited, and Welmouth vs. Patten, 2 Bibb, 280.

3. If the debtor be ready, at the time and place, to deliver the thing he has promised to give, and the creditor does not appear to receive the same, the contract or debt is as completely discharged as by a tender of the thing due.—Chifman on Contracts, p. 137 and following, and authorities there cited.

4. There was no sufficient property vested in the creditor from his selecting the cloth and ordering the debtor to make the same up into clothing, to enable the creditor to maintain trover against the debtor, without a demand for the same, and this in person, or by competent agent; *a fortiori*, he could not maintain this action.—Chitty's Pleading, p.

5. There is no sufficient statement or cause of action to be found in the record, nor is there any foundation upon which the court could legally enter up judgment upon.

B. F. HICKMAN, for Appellee.

The finding of the court (sitting as a jury) was in accordance with the evidence, and therefore the Court of Common Pleas did not err in overruling the motion for a new trial, upon the grounds filed.—4 Mo. Rep., 518.

The order upon which this suit was brought was given for \$50 in clothing, was accepted by the defendants below, who failed to furnish the clothing, and therefore they became liable for the money, and the Court of Common Pleas com-

Little & Noecker vs. Nelson.—Thompson vs. Botts.

mitted no error in refusing to arrest the judgment for the reasons assigned.—6 Mo. Rep., 250.

TOMPKINS, J., delivered the opinion of the Court.

This was an action commenced by Thomas Nelson, before a justice of the peace, against Little and Noecker. Before the justice, judgment was given against Nelson, and he appealed to the Court of Common Pleas.

Before this court, as the record tells us, came both the parties, by their respective attorneys, and no jury being required, all and singular the premises were by them submitted to the court, which being seen and heard, &c., the court found that the said defendants are indebted to the said plaintiff in the sum of fifty-four dollars and thirteen cents, &c., and the court gave judgment accordingly.

A new trial was demanded for the common reasons, viz., that the verdict was against law and evidence, which was, by the ingenuity of counsel, formed into six reasons. Testimony was given on each side, from which it appears, that one Etling gave the plaintiff, Nelson, an order on Little and Noecker, tailors, for fifty dollars in clothing. The order was accepted, and the clothing made, but not being delivered to the plaintiff's order, he brought suit. There was no exception to any of the evidence when offered; and the court, sitting as a jury, was prayed to decide no point of law by either party. In such cases, this Court is not inclined to reverse the judgment of the inferior court, when it has evidence to support its finding: here the evidence was abundant.

The judgment of the Court of Common Pleas is affirmed.

THOMPSON vs. BOTTS.

1. An instruction which assumes the existence of any fact in issue is erroneous.
2. Although a general warranty of soundness will not cover a defect visible to the senses, yet the existence of a malignant disease, such as scrofula, in the slave sold, which cannot always be detected by mere inspection, is not among those visible defects not included in a general warranty of soundness.
3. When there has been a breach of warranty of a slave sold, it is not necessary to return the slave, to give a cause of action.

APPEAL from Howard Circuit Court.

LEONARD, for Appellant.

1. The first and second instructions given to the jury, at the instance of the plaintiff, are erroneous.

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1st. They both assume as true the fact of the warranty, (a matter denied by the plea) and direct the jury to find for the plaintiff, if the other material fact in the issue (the unsoundness) be proved.

2d. The second instruction prescribes an improper measure of damages. Although the warranty extends to both the mother and the child, the present suit is for the unsoundness of the mother only, and of course the true measure of damages here is the difference between the value of the mother sound, and her value diseased, as she was alleged to be, and not the difference between the value of the *negroes* sound, (two instead of one) and their value diseased, as they are alleged to be.

2. A defect visible and known to the purchaser is not within the general words of a warranty; and therefore the court ought to have directed the jury, that the swelling in the neck, if visible and known to the plaintiff at the time of his purchase, was not an unsoundness within the warranty: what both parties well knew to exist, they did not intend to embrace within a warranty declaring that it did not exist. The mere swelling, therefore, was not *per se* an unsoundness within the warranty.—*Schuyler vs. Russ*, 2 Caine's Rep., 202; *Wade vs. Scott*, 7 Mo. Rep., 511; 3 Phillips' Ev., 1392, 1402.

CLARK and HERNDON, for Appellee.

1. The warranty in this case being in writing, the whole contract between the parties is evidenced by it, and no parol evidence of the terms of the contract or understanding of the parties, different from the terms of the writing, ought to be allowed. There would be little or no use in taking a written warranty, if exceptions not in the writing could be proved by parol. Upon this point, see 1 Bibb, 583; *Wade vs. Scott*, 7 Mo. Rep., 509; *Singleton vs. Ford*, 515; 1 Cowan, 251; Chitty on Contracts, 25. The principle in the instruction asked by the defendant, and refused by the Court, is directly opposed to the principle of the decisions here referred to.

2. The evidence given in relation to the diseased appearance of the children was proper, as the evidence of medical gentlemen proves, that such disease affects and makes its appearance in the offspring; the scrofulous appearance of the children was therefore a circumstance, with others, showing that the mother was afflicted with the disease, the same being inherent.

3. The court properly refused to permit the defendant to add an additional reason for a new trial, after the expiration of four days, and properly refused the new trial, upon the reasons filed; but even if the court ought to permit additional valid reasons filed after the four days, the reasons asked to be added in this case could have availed nothing if filed.—See 5 Mo. Rep., 248.

NAPTON, J., delivered the opinion of the Court.

This was an action of assumpsit brought by the appellee for a breach of warranty in the sale of a negro woman and child. The breach assigned, was the

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unsoundness of the woman at the time of the sale. The bill of sale warranted the negroes "sound and healthy in body and mind, and slaves for life." The plea was non-assumpsit, and the verdict was for the plaintiff.

On the trial, it appeared, that the negro woman, at the time of the sale, had a swelling on the side of her neck, about the size of a pea, which was shown to the purchaser, (Botts) with assurances from Thompson, (the defendant below) that it "would not hurt her, and if it did, he would make it good." That four or five months after the purchase, the plaintiff (below) brought the negroes back to the defendant, and desired him to take them back, which defendant declined. Several witnesses were examined, whose testimony tended to show that the woman was scrofulous, and that the child exhibited marks of the same disease. Objections were made to so much of the testimony as related to the condition of the child, but the objections were overruled by the court.

At the plaintiff's instance, the court gave the following instructions:

First: If the jury believe from the evidence, that the negro woman, Clara, was unsound or unhealthy, either in body or mind, at the time the defendant sold her to the plaintiff, and that the plaintiff returned, or offered to return her to the defendant, before the commencement of this suit, they will find for the plaintiff.

Second: If they believe the negro, Clara, was unsound or unhealthy at the time of sale, and they should believe that the plaintiff did not offer to return *them* to the defendant in a reasonable time, yet they will find for the plaintiff in damages, such an amount as they believe to be the difference between the negroes as sound and unsound.

Third: That it makes no difference whether the defendant knew the negroes to be unsound or not at the time of the sale.

The defendant asked the following instruction: "If the swelling on the slave's neck was visible to the plaintiff at the ~~time of~~ the purchase, and the plaintiff, before the purchase, saw or examined it, at the instance of the defendant, such swelling is not an unsoundness within the meaning of the warranty, for or on account of which the plaintiff can recover." This instruction the court refused, and the defendant took exceptions to such refusal, as well as to the instructions which were given. After verdict, the defendant applied for a new trial, and assigned the grounds usual in such applications, but the motion was overruled, and judgment entered on the verdict.

The first instruction is liable to the objection taken by the plaintiff in error, in assuming a fact (the existence of a warranty) which was put in issue by the pleadings. As a written warranty was produced upon the trial, and went to the jury without objection, it is apparent that this objection is merely technical; but the second instruction was also erroneous, in authorizing the jury to take into consideration the diminished value of the child as well as the mother. The allegation of unsoundness in the declaration was confined to the woman, Clara, and of course the damages should have been limited to the breach of warranty charged. This may have been a clerical mistake, and would be overlooked, if no testimony had been given on trial relative to the child; but as there was evidence touching the child's unsoundness, as well as its mother's, and intro-

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duced properly enough, if the object was to show the character of the mother's disease, the jury may have been misled by this instruction.

In other respects, we believe the instructions to have embraced a correct exposition of the law applicable to the case, except so much as relates to a return of the slave, which was unnecessary to give a cause of action; and the instruction asked by the defendant was rightly refused.

It is true, that a general warranty of soundness will not cover a defect visible to the senses; but the existence of a malignant disease, such as scrofula, is not a matter which can always be detected by mere inspection, even by the most skilful or scientific examiner. Such unsoundness is not among those visible defects to which the rule applies.

Judgment reversed, and cause remanded.—TOMPKINS, J., did not sit in this case.

ST. LOUIS INSURANCE COMPANY *vs.* GLASGOW, SHAW & LARKIN.

1. Insurers are responsible for a loss occasioned by a risk insured against, notwithstanding such loss may be attributable to the negligence or misconduct—not amounting to barratry—of the assured or his agents.
2. Where a steamboat was insured, among other risks, against fire, and afterwards was put on the floating dock, for the purpose of being repaired, and while on the dock was burned, and such burning was occasioned by the carelessness and negligence of the workmen having the boat in charge, the insurers were held liable for the loss.
3. Where the assured stipulates in the policy that the boat shall be completely provided with "master, officers and crew," it is no breach of such stipulation that the boat was placed, temporarily, in the charge of workmen, for the purpose of repairs.
4. Where the assured agrees that the boat shall be completely provided with "master, officers and crew," it is necessary to aver, in an action on the policy, that the boat was so provided.

APPEAL from Circuit Court of St. Louis.

SPALDING and TIFFANY, for *Appellants*.

H. R. GAMBLE, for *Appellees*.

NAPTON, J., delivered the opinion of the Court.

This was an action of covenant on a policy of insurance, brought by Glasgow, Shaw & Larkin against the insurance company.

The policy was for \$6,000 on one-fourth of the steamboat Pizarro, for one

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year, against the ordinary perils of "rivers, fires, enemies, &c.," and the assured agreed, "that the steamboat aforesaid should be competently provided with master, officers and crew."

The declaration contains no averment of a compliance with the agreement, that the boat should be competently provided with "master, officers and crew," but avers the loss to have happened within the year, and by fire, whilst the boat was lying at St. Louis.

The defendants filed several pleas, five of which were demurred to, and the demurrer sustained. These pleas are numbered on the record, the 5th, 6th, 7th, 8th, and an additional plea.

The fifth plea alleges, that the loss in the declaration mentioned was occasioned by and through the mere carelessness, negligence and misconduct of the plaintiffs, their servants and agents, then and there in the possession, charge and control of said boat.

The sixth plea avers, that, "just before the loss in the declaration mentioned, the plaintiffs, their servants and agents, caused the said steamboat to be put on a dock, called a floating dock, by means of which dock the boat was raised out of and above the surface of the river, and so continued until the loss; and while the boat was in that situation, the plaintiffs, their servants and agents, caused a fire to be made and kept in a stove on the deck of the boat, and caused large quantities of picked oakum to be placed and spread upon the deck of the boat, about and near the fire so made and kept by the plaintiffs, their servants and agents, whereby and by means whereof the peril and danger of consuming, burning and destroying said boat by fire, was enhanced and increased, without the knowledge, privity or consent of the defendants, contrary to the tenor and effect, true intent and meaning of the policy."

In the seventh plea, it is alleged, that, "before and at the time of the loss, the steamboat was on the floating dock, above the surface of the Mississippi; and just before the loss, certain workmen and laborers in the retainer of the plaintiffs caused a fire to be made in a stove on board the boat, and then and there, near and about the fire, picked a large quantity of combustible material, called oakum, and spread the said oakum about and near the fire, whereby the peril and danger of burning said boat was greatly increased, and, by the mere carelessness, negligence and misconduct of said workmen and laborers, the said oakum was set on fire, and by the fire so occasioned the said boat was burned," &c.

The eighth plea states, "that just before and at the time of the loss, the said steamboat was not in the possession, nor under the care or control of the plaintiffs or other owners, the master, officers and crew, or the servants and agents of the owners, or any of them, but the said boat, at the time when, &c., was in the possession of certain workmen and laborers, with the knowledge, privity and consent of the plaintiffs, and without the knowledge, privity and consent of the defendants, contrary to the intent of the policy, and while said boat was so in possession, and under the care and control of said workmen and laborers, the said boat was burnt, consumed and destroyed, by the mere carelessness, negligence and misconduct of the said workmen and agents, which is the same loss," &c.

The additional plea alleges, "that just before the loss, the plaintiffs and their servants and agents, without the knowledge or consent of the defendants, caused the boat to be put and placed on the floating dock, and raised above the water, and so kept until at and after the loss; and while the boat was so lying on the dock above the Mississippi river, and just before the loss, the workmen engaged in the retainer of the plaintiffs, in repairing the boat, did, unnecessarily and improperly, without the knowledge or consent of the defendants, cause a fire to be made and kept on board said boat, in a stove there, and did then and there, unnecessarily and improperly put, place and spread, near and about said fire so made and kept, and at other places in and about said boat, a large quantity of a certain combustible material, called picked oakum, whereby the danger and peril of fire, and the burning of said boat, became and was improperly and unnecessarily greatly increased and enhanced, contrary to the duty of the plaintiffs, their servants and agents in that behalf, and the meaning of the policy; and afterwards, while the said boat was so on the said dock, above the surface of said river, and while the said picked oakum was so kept and spread on and about the said boat, was then and there set on fire, and burned, and by the burning of said oakum, and the fire so occasioned, the said steamboat was burned," &c.

The only question presented by the record is, the propriety of the action of the Circuit Court in sustaining the demurrer to the above pleas.

Upon this question several points have been made, but the most important one arises out of the fifth, sixth and eighth pleas, in which the loss is averred to have been occasioned by the negligence, carelessness and misconduct of the agents of the assured. As the point is also involved in the consideration of the other pleas, it will first be disposed of.

It has been admitted in the argument of this case, and the adjudged cases fully sustain the admission, that where the misconduct amounts to barratry, and there is no express insurance against barratry, the underwriters will not be responsible for a loss occasioned by barratrous conduct of the agents of the insured.

It is also agreed, that where the insured have not complied with their express warranty, that the vessel shall be competently provided with master, officers and crew, a loss occasioned by such non-compliance is not covered by the policy. Some of the pleas demurred to are referred to this principle, and their sufficiency will be considered hereafter.

The question is, whether, when the insured have provided competent officers and crew, and the boat has been furnished with the necessary tackle and appurtenances, in compliance with the express warranty in the policy, the underwriters are discharged from a loss occasioned by a peril insured against, by showing that such peril was brought about by the negligence or mismanagement of the agents of the insured. Upon this question the counsel for the appellants has presented, in his brief, a critical review of all the authorities, reaching back to some of the earliest English cases. We shall not attempt to reconcile the cases thus arrayed, nor to defend the opinions and course of reasoning which have given occasion to the comments, and in some instances to the censure of the learned counsel.

An examination of the cases will, we think, show, that since the case of *Burk*

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vs. Royal Exchange Company, decided in 1818, nearly every court in which this question has arisen has manifested a decided inclination to hold the underwriters responsible for losses occasioned by a risk insured against, notwithstanding such loss may have been attributable to the negligence or misconduct of the assured or his agents.—*Walker vs. Maitland*, 5 Barn. & Ald., 171; *Bishop vs. Pentland*, 7 Barn. & Cress., 219; *Patapsco Insurance Company vs. Coalter*, 3 Peters' Rep., 222; *Columbia Insurance Company vs. Laurence*, 10 Peters, 507; *Waters vs. Merchants' Insurance Company*, 11 *Ibid.*, 213; *Perrin's Administrators vs. The Protection Insurance Company*, 11 Ohio Rep., 147.

The doctrine established by these cases, we consider founded on principles of sound policy. It does not depend upon the insertion of barratry, as one of the risks assumed, but it arises from the fact, that the loss happens by a risk aimed against, and that to permit the insurer, in such cases, to show that it can be traced, either immediately or remotely to some negligence, carelessness, inattention or misconduct of the owner or his agents, would be to raise an implied warranty, not of the *general competency* of master, officers and crew, but of their diligence *at all times, and under all circumstances*. To adopt this construction of the policy would certainly tend to great embarrassment in the recovery of claims clearly understood to be secured by the contract of the parties. It would be imposing upon the assured a liability which is certainly not to be found in the words of his contract, and not, as we think, justified by its spirit. He is bound to provide competent officers, and to have his vessel seaworthy, but he does not stipulate that these officers shall be exempt from the frailties incident to men in all situations; that they shall exercise such diligence as shall prevent all losses from mistakes, carelessness and negligence. If the negligence be what is called *crassa negligentia*, which is by some writers considered synonymous with fraud, the case is different, and the underwriters are exempt upon another principle, unless fraud also is expressly insured against. Indeed, there are few of the risks contained in the common marine and river policies, which might not be traced to some act of negligence or oversight in those having charge of the vessel. In the case of fire especially, we cannot readily conceive of any loss by this element, unless in cases of lightning, where it must not necessarily have been the result of some mismanagement on the part of those in command or their servants. To say, in such cases, that though the vessel has been insured against fire, yet the underwriter has not insured against a fire happening by negligence, would be to "keep the word of promise to the ear and break it to the hope."

It is true that this doctrine, that negligence or misconduct on the part of the servants or agents of the insured will not exempt the underwriters, where the loss is occasioned by a peril insured against, was originally held in cases where barratry was one of the perils enumerated in the policy, and this circumstance afforded the courts a plausible ground for the adoption of the rule. This was the ground taken by Judge Johnson in the case of the *Patapsco Insurance Company vs. Coalter*, (3 Peters) decided in 1830, though Judge Story subsequently intimates, in the case of *Waters vs. Merchants' Insurance Company*, that a majority of the court were for the plaintiff, upon the general ground, that the proximate

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and not the remote cause was to be looked to. Upon the insufficiency of this course of reasoning, the Supreme Court of Ohio chiefly relied on the fire cases referred to in the brief of the appellant's counsel for adhering to the doctrine supposed to have been settled by more ancient cases, and disavowing and repudiating what was thought to be a mere innovation by the court in *Bank vs. Royal Exchange Company*. In all the English cases, we suppose barratry was among the enumerated perils in the policy, but in the case of *Walker vs. Maitland*, (5 Barn. & Ald., 171,) though this circumstance is alluded to by the judges, their opinion seems to be founded mainly upon the ground, that the immediate cause of the loss was a peril insured against, and the underwriters should not be permitted to show negligence as a cause of such peril, because there was no implied warranty in the policy that there would be no negligence. Bayley, J., says, "It is the duty of the owner to have the ship properly equipped, and for that purpose, it is necessary that he should provide a competent master and crew in the first instance; but having done that, he has discharged his duty, and is not responsible for their negligence as between him and the underwriters." Holroyd, J., says, "This case cannot be put on the ground of the breach of the implied warranty to provide a master and crew of competent skill. It is sufficient if the owners provide a master and crew generally competent; *there is no implied warranty that such a crew shall not be guilty of negligence.*"

So, in the case of *Bishop vs. Pentland*, (7 Barn. & Cress., 219,) the court seem to lose sight of the barratry clause, as affording any reason for their conclusions; and Bayley, J., says, "The case of *Burk vs. The Royal Exchange Company*, and *Walker vs. Maitland*, establish as a principle, that the underwriters are liable for a loss, the proximate cause of which is one of the enumerated risks, though the remote cause may be traced to the negligence of the master and mariners." And Holroyd, J., says, "It is clearly established, that if there be an actual stranding, although it arise from the negligence of the master and mariners, the underwriters are liable."

The *Columbia Insurance Company vs. Laurence*, (10 Peters, 508,) was a case of insurance against fire on land, but the opinion delivered by Judge Story shows the gradual progress of this doctrine in that court. "In regard to marine policies," says Judge Story, "this was formerly a question much vexed in the English and American courts; but in England, the point was completely settled, in *Burk vs. Royal Exchange Company*, upon the ground, that *causa proxima non remotu spectatur*; and therefore, a loss whose proximate cause is one of the enumerated risks in the policy, is chargeable to the underwriters, although the remote cause may be traced to the negligence of the master and mariners. Although, in that case, the risk of barratry was also assumed by the underwriters, yet it is manifest that the opinion proceeded upon the broad and general ground. The same doctrine was afterwards affirmed in *Walker vs. Maitland*, and *Bishop vs. Pentland*, and is now deemed incontrovertibly established. The same doctrine was fully adopted in this court, in the case of the *Patapsco Insurance Company vs. Coalter.*"

These remarks of Judge Story are certainly *obiter dicta*, and may be obnoxious

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to the severe criticism bestowed on them by the appellant's counsel, but they show that the unsatisfactory reasons given by the British judges for a doctrine advanced, as is now said, for the first time in 1818, were no obstacle to its rapid adoption by other courts, and that this Court was even then prepared to sanction it to the same extent it was ultimately settled in *Waters vs. Louisville Marine Insurance Company*.

In Ohio, the case of *Lodwicks & Kennedy vs. Ohio Insurance Company*, (5 Ohio Rep., 433); *Gazzam vs. Ohio Insurance Company*, (1 Wright's Rep., 202); *Jolly's Executors vs. Ohio Insurance Company*, (1 *Ibid.*, 539); *Fulton & Foster vs. Lancaster Insurance Company*, (7 Ohio Rep., 1,) were decided since the case of *Burk vs. Royal Exchange Company* in England, and they are the only cases to which we have been referred, in which the doctrine held in this last and the succeeding English cases has been expressly denied, that were decided since the year 1818. These cases have all been overruled by the same court, in *Perrin's Administrators vs. The Protection Insurance Company*, 11 Ohio Rep., 147. Whatever may be thought of the propriety of that court's yielding to the authority of the Supreme Court of the United States, in a question upon which the opinion of that court was not binding upon them, it is at least to be inferred, that the policy and good sense of the doctrine must have been most striking, to have induced a court thus to overrule what had been solemnly and repeatedly adjudged in several previous cases.

In opposition to this doctrine, thus authoritatively settled in England, in Ohio, and in the Supreme Court of the United States, the counsel for the appellants have cited numerous adjudications on both sides of the Atlantic.—*Gordon vs. Remington*, 1 Camp., 123; *Hodgeon vs. Malcom*, 5 Boss & Pull., 336; *Phyan vs. Royal Exchange Company*, 7 T. Rep., 510; *Vos & Graves vs. U. Insurance Company*, 2 Johns. Ca., 180; *Brazier vs. Clapp*, 5 Mass. Rep., 5; *Cleveland vs. Union Insurance Company*, 8 Mass. Rep., 308; *Grin vs. Phoenix Insurance Company*, 13 Johns. Rep., 451. In relation to these cases, it may be observed, that they were all decided previous to 1818. Moreover, many of these cases, though apparently conflicting with the views which now prevail in relation to the duties of the insured, in a marine or river policy, will be found to turn upon that clause of the policy which stipulates for the competency of the master and crew of the vessel. The mere fact of negligence or misconduct is not the leading and prominent feature in the cases; but it is connected with the breach of the express or implied warranty, that the insured will employ competent agents. For instance, the case of *Brazier vs. Clapp* was a case in which the captain of the vessel had pursued a route from Boston to New Orleans which was unusual, and Judge Sedgwick, who delivered the opinion of the court, said, "A general position, that the mistake of the captain, under no circumstances, forms an excuse for a deviation, is certainly not true. The most skilful, discreet and prudent master may, and probably, in almost all long voyages, does commit mistakes, by which his ship may be taken out of the most direct and shortest course. Such is not a deviation that will discharge the underwriters." But he adds, "If the captain had ordinary skill, and was informed, as he ought to have been, as to the

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voyage he was pursuing, no fact which was exhibited at the trial, or is now pretended to have existed, amounts to anything like a justification or excuse for the deviation on which the defendant relies as having vacated the contract. If such skill and information were possessed by the captain, the deviation would seem to be merely wanton, or done for the convenience of the captain, in landing his wife on the vineyard. On the other hand, if the deviation happened either from the want of skill or the gross ignorance of the captain, that would doubtless defeat the claim of the plaintiffs to recover; for, among other things which the law, from the nature of the contract of assurance, imposes as obligation upon the assured, is the duty to provide a master of competent skill, prudence and discretion to navigate the vessel, and if any loss takes place, which may be justly supposed to have happened from a master of that character not having been provided, the underwriters are not responsible for it."

Now, there is nothing in this opinion conflicting with the position which we maintain. The insured is bound, by the express stipulations of the contract, to provide a master, and one of competent skill, prudence and discretion; but it does not therefore follow, that he also warrants that the master thus ordinarily competent, shall not be guilty of negligence or mistakes. In the case cited, it was a mere question of evidence, and the Massachusetts court only hold that the departure from the usual route, proved in that case, was evidence of such unskillfulness, or gross ignorance in the captain, as showed him not to have been a competent master, within the meaning of the policy, and was therefore such a breach of the warranty as to discharge the underwriters.

So, in *Cleveland vs. Union Insurance Company*, (8 Mass. Rep., 308,) the ship's register was left behind, and a loss by capture ensued; and though it is not pretended that the decision in this case can be reconciled with the doctrine since established, yet the remarks of Judge Sedgwick will show, that the breach of the supposed warranty of the competence and skill of the master is principally relied on to discharge the underwriters. "The principle of an implied warranty," says Judge Sedgwick, "on the part of the assured, that everything shall be done to prevent a loss, pervades the whole subject of marine insurance, or, in other words, that the insurer shall be responsible for no loss but such as is occasioned by some of the perils which, according to a fair construction of the contract, was, in the understanding of the parties, insured against. Hence is the principle, that the insurer shall answer for no loss resulting from the gross negligence or ignorance of the master, or from the want of a competent crew: hence also, the insurer is not liable for any loss or damage which may happen to goods from any fault or defect of the ship, not arising from the violence of the wind or sea, or from an accident or misfortune in the voyage, but from a latent defect before she sailed; hence, too, there is an implied warranty that the ship shall proceed in the usual and common route, and therefore, a deviation from it discharges the underwriters."

Here the learned judge lays down principles to which, in the main, no exception can be taken. The general principle, that it is the duty of the assured to do everything, on his part, to prevent a loss, is a sound one: among other things, it

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is his duty to provide his vessel with a competent master, and if he employs an incompetent or unskilful one, he must bear the loss which results from the ignorance, misconduct or mistakes of such agent. But when the assured has performed his duty in this behalf, and has selected and employed a master of ordinary prudence and skill, it would seem that he had complied with his whole duty, and had fulfilled his part, not only of the letter, but the spirit of his contract. When, therefore, the judge goes further, and requires the insured, not only to comply with his express warranty, by employing competent agents, but to warrant that his agent shall not, during the voyage, be guilty of any act of negligence, unskilfulness or misconduct, he is imposing an obligation upon the assured not to be found in the contract, nor fairly to be inferred from it, and is making him responsible for the very acts and contingencies against which he seeks an indemnity.

The case of *Grimm vs. The Phoenix Insurance Company*, 13 Johns. Rep., 451, is the strongest case we have seen to establish the doctrine, that a loss by fire, proceeding from the negligence of the master and mariners, is not a loss within the policy, though barratry be one of the risks. That case was decided in 1818, and by a court of eminent ability. We will only remark upon it, that the facts upon which the judgment was founded presented a case of the grossest negligence, though the opinion of the court is placed on the general principle, that underwriters have no concern with the competency or skilfulness of the master and crew, and *therefore*, any loss occasioned by the carelessness or negligence of these agents does not fall upon the underwriters. This conclusion is not, we think, warranted by the premises. We will only add, that it is somewhat remarkable that the Supreme Court of New York, and the Court of King's Bench, about the same time, from the same premises, arrived at conclusions exactly opposite. Whilst the Court of King's Bench consider the insertion of barratry as one of the perils insured against, as affording the strongest grounds for concluding that the underwriters intended to be responsible for every inferior degree of carelessness or misconduct, the Supreme Court of New York regard that circumstance as furnishing a violent presumption that every such negligence and misconduct as did not amount to barratry was not covered by the policy. The decision of the English court is now most generally sanctioned, but the reasons given for the decision, in *Burk vs. Royal Exchange Company*, (the case referred to) are certainly not satisfactory, and the New York court was much better warranted, if the clause concerning barratry was to control the decision, in a different conclusion. The case in New York was afterwards reviewed by Judge Johnson, in the *Patapsco Insurance Company vs. Coalter*, and the opinion was disregarded by the Supreme Court of the United States.

Upon the whole, without referring particularly to the other cases to which the appellant's counsel has cited us, we are disposed to adopt the views taken by Judge Story in *Waters vs. The Merchants' Insurance Company*. No late case in New York has been cited, from which it could be seen, whether that court would now adhere to an opinion running counter to the current of modern authorities; nor are the cases in Massachusetts of so decisive a character upon the

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precise question arising in this case, as to afford any obstacle to an ultimate adoption by that tribunal, of the generally-received doctrine. In Ohio, as we have seen, the Supreme Court of that State has readily yielded to the force of authority and reason, notwithstanding several opposing decisions of the same court upon the precise question. The doctrine is firmly established in England and in the Federal courts. Under these circumstances, the case being of the first impression here, this Court cannot hesitate, especially as we venture to affirm that the doctrine is most consonant to the terms and spirit of the policy of insurance, and commended by every principle of sound public policy.

The second point made by the appellants is founded on the eighth plea. That plea alleges, that, at the time of the loss, the boat was not in the possession or under the control of the master, officers or crew, or any of the servants or agents of the owners, but under the control of certain workmen and laborers, with the privity and consent of the plaintiffs. The question is, whether this is any breach of the warranty, that the boat shall be competently provided with master, officers and crew. It is certainly the duty of the owners to see that the vessel is repaired, when repairs are necessary, and it is not charged that repairs were in this case unnecessary, or that any unusual or illegal mode or plan of repairs was pursued: nor is it pretended, that a boat placed on a dry dock, for repairs, should have a full complement of officers and crew; but it is urged, that the owners should have at least some one to attend to their interests, and watch the safety of the vessel, whilst it is undergoing repair. Now, if we are compelled to give the warranty a literal construction, the presence of a single watch, on the part of the owners, would surely not be a literal compliance with the warranty; for master, officers and crew are all required. But to contend that a vessel on shore, or laid up on dock, must have the same number of hands which would be necessary to enable her to pursue a voyage, would be so manifestly against the true intent and meaning of the contract of insurance, that it is not urged. If the vessel was abandoned, on shore, to the hands of strangers, or was hauled on shore, and converted into a shop or store, as was suggested in the argument at bar, such a state of facts would clearly discharge the underwriters, because it was not contemplated in the policy that the boat should be appropriated to any such purposes. But it is within the contemplation of both parties, that the boat will need repairs, and for that purpose, that it must be delivered over to the care and custody of the mechanic who undertakes the work; and it is not shown that it is customary or proper that the owner should appoint an agent to watch the boat or the workmen, whilst in this condition. If there be such a custom, it should be pleaded: *prima facie*, I should suppose it unnecessary. Such is not the law or custom in relation to other bailments; and if there be any custom which requires it, in the cases of boats or vessels, it should be shown.

The next point we will consider, is the fifth point made in the appellants' brief, and involves the sufficiency of the additional plea. The same defence attempted to be set up in this plea, is also contained in some of the other pleas; but as the additional plea contains a more minute and perfect statement, and is not liable to some objections which are urged against the others, we shall con-

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sider this plea only, as embracing a statement most favorable to the appellants. This plea, in substance, alleges, that whilst the boat was on the St. Louis Dry Dock for repairs, the workmen unnecessarily and improperly made a fire in the stove, and unnecessarily and improperly placed and spread a large quantity of picked oakum near to the said stove, by means of which the risk of firing the boat was increased, and whilst in this situation the loss happened. The defence is designed to embrace a mere variation or increase of risk, and a loss during, but not the consequence of such increase or change of risk. We are not disposed to deny the general proposition, that a variation or increase of risk will, in some cases, perhaps in all cases where such increase of risk is the cause of loss, discharge the underwriters. It is upon this principle that a loss from deviation falls upon the owners. It is because such variation is against the letter or the intent of the policy. Thus, in the case of an insurance against fire on land, the house insured is described in the policy as a brick-house separate and apart from other buildings, covered with tin, &c., and the insured builds a frame-house immediately in contact with the house insured. The frame building takes fire, and the fire is communicated to the house insured. Here has been an increase of risk, by the act of the insured, against the obvious intent and meaning of the policy, and the underwriters might well claim an exemption from such losses. (*Stetson vs. Massachusetts Mutual Fire Insurance Company*, 4 Mass. Rep., 330.) So also, where an insurance is effected on a voyage, the termini of which are designated in the policy, a deviation from the usual course of such voyages discharges the underwriters, upon the principle that the risk is varied, whether increased or not, and is not the same contemplated by the parties.

Admitting this general principle, we are yet constrained to view the additional plea as a mere plea of negligence, and that it does not contain the allegations necessary to bring it within the class of cases in which a variation of risk is admitted to be a good defence. The plea alleges negligence and misconduct, setting forth the circumstances in which that negligence consisted. It avers, that whilst the boat was on the dry dock, the workmen engaged in making repairs, unnecessarily and improperly made a fire in the stove, and unnecessarily and improperly spread picked oakum near said fire, and that this enhanced the risk of setting fire to the boat. Had the plea alleged that the boat was unnecessarily and improperly placed on the dock, and that, whilst in that situation, the workmen unnecessarily and improperly built a fire, &c., it might have been regarded as of the character designed, and the defendant must have taken issue upon it, or set up a special custom, authorizing the boat to be placed upon such dock. As it is, it is difficult to distinguish it from a special plea of negligence, and therefore involves the same question heretofore considered.

As the declaration contained no averment that the boat was competently provided with master, officers and crew, and the defendants' demurrer reached back to the declaration, the judgment upon the demurrers should have been for the defendant.

The judgment of the Circuit Court is therefore reversed, and the cause remanded.

THOMPSON vs. SMITH & CAVENDER.

The act of Feb. 15, 1841, (see session acts of 1840-41, p. 15,) providing, that judgment may be rendered, in certain cases, against the principal and sureties in the bond given in retaining possession of property attached, is prospective, and applies only to bonds executed after the passage of the act.

ERROR to St. Louis Circuit Court.

SPALDING and TIFFANY, for Plaintiff in Error.

1. This proceeding by motion on a bond, for the forthcoming of property attached, is under the Act of Assembly of Feb. 15, 1841.—Acts of 1840-41, p. 15.

2. The act was prospective, and does not authorize judgments on such bonds by motion, except in cases where the judgment in the original suit shall be rendered after the passage of the act.—See the phraseology of the act.

3. That act does not apply to bonds which had been given under statutes not then in force, its language expressly confining the summary remedy there furnished to bonds *given as now authorized by law*.

1st. The bond in question was taken while the act in Revised Code, p. 75, was the only law on the subject of attachments.—See sec. 14 and 37.

2d. That act was modified by act of February 6, 1837, p. 8, sec. 2, authorizing the giving of bonds for the property, different from any bond under the former law, which last act is still in force, and was in force in 1841.

4. The bond in question was not authorized by any law, was a mere voluntary bond, and of course not embraced in the act of 1841, giving the remedy by motion.—See Revised Code, p. 78, sec. 14; *Ibid.*, p. 80, sec. 37; Acts of 1836-37, p. 8, sec. 2.

HOLMES, for Defendant in Error.

1. The act of 1841, on this subject, is a remedial statute; and it was designed to furnish a speedy remedy upon bonds of this kind, and to obviate the necessity of a suit upon the bond, which would always be attended with delay, trouble and expense.—Acts of 1841, p. 15.

2. This bond came within the terms and policy of that act, as a bond continuing in force, and given as theretofore authorized by law.—Acts of 1841, p. 15.

TOMPKINS, J., delivered the opinion of the Court.

In December, 1836, an attachment at the suit of James Smith, William H. Smith, and John Cavender, plaintiffs, against Charles Gillaspie and Samuel Cover, defendants, was levied on fifteen sacks of coffee, which were released from the attachment by the sheriff, on his taking a bond conditioned, that if the effects so attached and restored should be produced and delivered, subject to the

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judgment of the court, &c., then the obligation to be void, otherwise it should remain in full force.

On the second day of November, 1843, a rule was served on John S. Thompson, one of the obligors in said bond, requiring him and Samuel Cover, the other obligor, to produce the coffee, and deliver it to the sheriff on the third Monday of that month. On the fifth day of December, 1843, a motion was filed by the said Smiths and Cavender, for judgment on said bond against Cover and Thompson, the principal and security in the bond. Notice was served on Thompson only; and on the 22d of December, judgment was rendered on this motion, in favor of Smith, Smith and Cavender, against John S. Thompson, for \$124 63, debt, and \$58 87, damages. To reverse this judgment, Thompson has sued out this writ of error.

On the trial of the motion, the plaintiffs gave in evidence the said bond, the said order of the court to produce the property, with the sheriff's return thereon that the same was not produced; and execution in favor of the said plaintiffs against Samuel Cover, impleaded with Charles Gillaspie, issued the 29th September, 1837, with the sheriff's return, that Cover had no property in his county, and that the property attached at the commencement of the suit was not found, nor delivered according to the condition of the bond. No other testimony was given on the motion.

The defendant, Thompson, then asked the court to decide (in the nature of an instruction to a jury) that there could be no judgment for the plaintiff in this form of proceeding upon the bond: this decision the court refused to make; and the defendant excepted to the decision of the court.

The act of 15th February, 1841, p. 15 of the pamphlet acts, is the first act that gave the plaintiffs in attachments the right to proceed on bonds, of the character of this under consideration, by motion. The act is entirely (as it should be) prospective. The words are—"That whensoever, in an attachment suit, judgment *shall* be rendered against the defendant, and an execution issued thereon, and the return of 'No property found' shall be made thereto, it shall be lawful for the Circuit Court, &c., on motion of the plaintiff in such suit, to enter judgment in his favor for the amount due, &c., against the principal and his securities, in the bonds, &c.

It is contended by the counsel for the defendants in error, that this is a remedial statute, designed to furnish a speedy remedy upon bonds of this kind, and to obviate the necessity of a suit upon the bond, which would always be attended with delay, trouble and expense. This is rather a new idea of a remedial statute. It might be very beneficial to the plaintiffs in the action, but it has not been thought beneficial to the obligors in such bonds, to have their liability under the bond decided on in this summary mode, and certainly the legislature have not used such words as to leave its intentions doubtful. Many persons might be willing to become security in a bond if a suit were to be brought on it in the usual manner, who would by no means become so if judgment could be entered on motion in a summary manner.

The judgment of the Circuit Court must be reversed.

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MISSOURI INSURANCE CO., OF ST. LOUIS, *vs.* GLASGOW, SHAW & LARKIN.

APPEAL from St. Louis Circuit Court.

SPALDING and TIFFANY, for Appellant.

I. It is alleged in the 8th plea, and admitted by the demurrer, that, at the time of the loss, the boat was not provided with master, officers and crew, within the meaning of the warranty contained in the policy, and that the loss happened while such non-compliance with the warranty continued. This would have discharged the insurers, and the demurrer should have been overruled.—3 Term Rep., 360; 1 *Ibid.*, 343; 2 *Ibid.*, 186; Cowper's Rep., 785; 1 Philips on Insurance, 351, 352, (second edition.) Those references fully sustain the position that *express warranties must be strictly complied with.*

2. And a non-compliance with an express warranty discharges the underwriters.—7 Term Rep., 156; *Ibid.*, 705; 3 Burr. Rep., 141, 9; 1 Term Rep., 343; 7 Term Rep., 186; 1 Phil. Ins., 356.

II. As is alleged, in the 5th, 5th, 7th and 8th pleas, that the loss was *occasioned by the negligence and carelessness* of the assured and their agents, and therefore the underwriters were not liable.—1 Phil. on Ins., (1st edit.), 224; 6 Term Rep., 656; 7 *Ibid.*, 160; *Ibid.*, 186; *Ibid.*, 501, 705; 8 *Ibid.*, 192; 5 Bos. & Pul., 336; 1 Campbell's Rep., 123, 421, 434; 3 *Ibid.*, 133, 142; 14 East's Rep., 374; 4 Campbell's Rep., 142; 1 Johns. Cases, 246; 2 *Ibid.*, 280; 5 Mass. Rep., 5; 8 *Ibid.*, 308; 9 Johns. Rep., 17; 5 Binney's Rep., 595; 13 Johns. Rep., 451; 21 Eng. Com. Law Rep., 411; 8 Pick. Rep., 14.

The above cases maintain or recognize the doctrine, that unskilfulness or negligence of the assured, or their agents, discharge the underwriters from losses occasioned thereby.

III. And the fact that this loss was by fire makes no difference, as it was under a marine policy, and the liability of the underwriters for loss, by fire, under such policies, is governed by the same rules as one applicable to losses by other perils insured against.—1 Phil. on Ins., 630; 13 Johns. Rep., 451; 2 Johnson's Cases, 180.

In ordinary fire policies on land, insurers are liable for losses arising from negligence of servants, &c., on the principle, that an exception from a general clause leaves all other cases within the scope of the close. These policies except sundry losses by fire.—10 Peters' Rep., 517.

IV. The recent decisions, in several cases in England and the United States, tending to overthrow the established doctrine, that the underwriters are discharged, by the negligence or unskilfulness of the assured or their agents, from losses arising thereby, are not supported by reason or analogy, and ought not to be held as altering the law of insurance in this respect.

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The recent decisions above referred to are—2 Barn. and Al., 73, *Busk vs. Royal Exchange Assurance Co.*; 2 Barn. and Al., 171, *Walker vs. Maitland*; 7 Barn. and Cres., 219, (14 Eng. Com. Law Rep., 33,) *Bishop vs. Pectland*; 3 Peters' Rep., 222, *Patapsco Ins. Co. vs. Coalter*; 11 Peters' Rep., 213, *Waters vs. Merchants Louisville Insurance Co.*; 3 Sumner Rep., 270, *Williams vs. Suffolk Insurance Co.*

1. The doctrine attempted to be introduced by the above cases was unknown in England and America till 1818, and has never been recognized in any of the State courts. Foreign jurists, the State courts, and the earlier English decisions maintained, that the insurer is not liable for a loss occasioned by the fault or misconduct of the assured or his agent, unless it has been expressly insured against.—1 Wright's Rep., 202, 539; 5 Ohio Rep., 433; 7 *Ibid.*, part 1, p. 277.

These cases discuss the doctrine in reference to river policies, and hold to the old law, that negligence discharges the underwriters.

2. In the policies on the western rivers, there is usually no insurance against barratry, while the ordinary form of marine insurance contains barratry as one of the perils.

V. The risk was increased unnecessarily by the appellees and their agents, and the loss happened in consequence thereof; this discharges the underwriters; it is in the nature of deviation.—1 Philips' Ins., 480, 485-487; 7 Martin's Rep., (new series) 128; Douglass' Rep., 284, *Lavalett vs. Wilson*; 7 Mo. Rep., 379, *Settle & Bacon vs. Perpetual Insurance Company*; 1 Philips on Ins., from 481 to 575, and authorities there cited.

H. R. GAMBLE, for Appellees.

NAPTON, J., delivered the opinion of the Court.

This was an action upon a policy of insurance, and, in every respect, is like the case of the Saint Louis Insurance Company against the same parties, decided at the present term, except that the declaration contained the usual averment, that the boat was sufficiently found in tackle and appurtenances, and competently provided with master, officers and crew.

The judgment will, therefore, be affirmed.

POMEROY vs. SELMES.

A bill of exceptions cannot be tendered and signed at a subsequent term of the court without the consent of the other party.

ERROR to St. Louis Court of Common Pleas.

MIRAN LESLIE, *for Plaintiff in Error.*

1. The assignment was void, as against the letter and policy of the late Bankrupt Act.
2. The assignment, if otherwise good, was void as assigning the property of Selmes to pay the debts of McFarlane.

GEYER, *for Defendant in Error.*

1. No question arises on the bill of exceptions, the exceptions not having been taken during the trial, nor at any time before verdict; at least, it is doubtful when the exceptions were taken, and in such case the court will intend against the party whose duty it was to make the matter plain.—Rev. Code, 1835, p. 464, sec. 20; 3 Cowan, 32; 9 Johns., 346; 1 Salk, 288; 4 Peters, 107; 7 Mo. Rep., 210, 250; 2 *Ibid.*, 195.

2. None of the reasons assigned for a new trial can be considered by this Court: the bill of exceptions does not purport to set out the whole evidence. (Hammond vs. Russel et al., 1 Mo. Rep., 232; 4 *Ibid.*, 18, 438; 5 *Ibid.*, 110; 7 *Ibid.*, 6.) The Court cannot ascertain whether the verdict is without or against evidence, nor whether the instructions asked or given were proper. It may be, and most probably it was proved, that Pomeroy, the plaintiff, was party to the fraud of Selmes; that all the property attached was *bona fide* the property of McFarlane, and was sold to him by the very persons for whose benefit the assignment was made.

3. For anything that appears upon the record, the decision of the court below, in refusing instructions prayed for, and in giving those which were given, were entirely correct; because—

1st, It does not appear that any of the goods transferred by Selmes to McFarlane were among those assigned by the latter, or attached by the plaintiff; on the contrary, all the goods attached appear to have been purchased by McFarlane, on his own credit.

2d, The goods purchased by McFarlane in his own name, and with his own money, never were the goods of Selmes, and could not be held to the payment of his debts, to the exclusion of the creditors of McFarlane.

3d, If the goods, whether transferred by Selmes, or purchased by McFarlane,

could be regarded as the property of Selmes, as between his creditors and McFarlane, they were still more clearly the property of McFarlane, as between his creditors and Selmes.

4th, The assignment under which Dickson claims being for the benefit of creditors, the legal effect is the same as if an absolute sale had been made by McFarlane to the creditors, in whole or in part satisfaction of their demands. The trustee is not a mere volunteer, and is entitled to all the immunities of a *bona fide* purchaser for valuable consideration. He holds the property against the creditors of the fraudulent grantor.—3 B. A., 307, 8, 9; 13 J. Rep., 471; 18 *Ibid.*, 575; 6 Cranch, 133; 2 Sug. on Vend., 198; *Newel vs. Kean*, 1 Mo. Rep., 754; 5 *Ibid.*, 296.

5th, If Selmes is to be regarded as the owner of the goods purchased by McFarlane of others, it must be because they were purchased with the money of Selmes, an assumption inconsistent with the record.

6th, Regarding Selmes as the real owner of the goods, McFarlane was the apparent owner, and Selmes was trading in the name, and doing all things by the hand of McFarlane, in making the assignment, as well as in all else. If the goods purchased in the name of McFarlane were his, so also were the debts contracted in the purchase.

7th, The power of McFarlane to make the assignment in his own name, was as complete and full as his power to sell in the course of business; and the creditors of Selmes can no more impeach the assignment, than they could a sale made in the course of business.

8th, It is perfectly consistent with the facts stated on the record, that the assignment was made with the consent, and by the authority of Selmes, or was ratified by him afterwards; and in either event, the assignment must be regarded as the act of Selmes.

9th, The assignment being the act of Selmes, is not fraudulent, because one set of creditors are preferred to the exclusion of others; such deeds are valid, not only as between the parties, but as against the excluded creditors.

10th, The first instruction refused refers to the goods assigned, not those attached, and to an indefinite time. If the time of the attachment is meant, it is clearly wrong, in that it refers a question of law to the jury; if the time of the assignment, it is wrong, because of the same objection, and moreover excludes from the jury the acts of the parties between the execution of the deed and the levy, and excludes also the fact, that the plaintiff was one of those who held out to the world that McFarlane was the owner, had sold him goods, (a part, perhaps, of those attached as such) and calls upon the jury to prefer the plaintiff to the creditors which he had conspired to delude.

11th, The second instruction refused assumes, as a proposition of law, that if Dickson only claimed the property as assignee of McFarlane, for the benefit of his creditors, he is not to be regarded as a purchaser for valuable consideration, as against the creditors of Selmes, although the property assigned was the *bona fide* property of McFarlane. This is clearly inadmissible.

12th, The third of the refused instructions is liable to the same objection as

the second. It assumes, that the creditors of Selmes may pursue the property by attachment, that is, subject it to their demands, although it did not belong to Selmes, and was the property of another person, and that as against the creditors of that person for whose benefit he assigned it.

13th. Dickson unquestionably established a *prima facie* right to the property, by showing, that before the assignment it was in the store and apparent ownership of McFarlane; that it was conveyed to him, and possession taken, before the attachment: and certainly, if the possession of McFarlane, as owner, was with the consent of Selmes, and the ownership of Selmes (if it existed) was unknown to the creditors for whose benefit the assignment was made, Dickson's title, under the conveyance, is not impaired by the fact that Selmes was the real owner. Still less can the assignment be defeated, when the creditors, secured by it, became such in the course of business, relying upon the apparent ownership of the assignor, who was represented to be owner, by the real proprietor, and by the very creditors of that proprietor, who seeks to avoid the assignment.

TOMPKINS, J., delivered the opinion of the Court.

This was an action of assumpsit, brought by George Pomeroy against Selmes, in the Court of Common Pleas of St. Louis county. The declaration contained three counts, on three several notes, purporting to be made by one James McFarlane, to Selmes, the defendant, and by Selmes assigned to the plaintiff, Pomeroy, all bearing date in May, 1842. The common counts were also contained in the declaration. The plaintiff made affidavit, that he believed Selmes had fraudulently disposed of his property and effects, so as to defraud and delay his creditors, and procured an attachment to issue. The sheriff returned, that he had attached certain property as belonging to Selmes, the defendant, and read the writ to him, &c. At the return term of the writ, judgment by default was entered upon the instrument of writing sued on, for \$913 49.

One Charles K. Dickson claimed the property attached, and interpleaded. Verdict and judgment for Dickson, the interpleader. Execution was issued by Pomeroy against Selmes on the judgment obtained against him, and it was returned, "No goods, chattels, lands or tenements found," &c.

Dickson, the interpleader, claimed the property attached, under a deed of assignment made to him by the said McFarlane, the maker of the notes, on which action is founded. The deed sets out, that McFarlane, being unable to meet all his debts, &c., and deeming it just and reasonable to give all his creditors an equal chance of payment, a general assignment of all his goods, &c., for the benefit of creditors, *pro rata*, &c., grants, bargains, conveys, assigns, transfers, &c., unto Dickson, &c., all his stock in trade, goods, wares and merchandize, debts, choses in action, &c., upon condition that Dickson sell and dispose of them; first, for the benefit of McFarlane's creditors, and then, if any balance be left, to refund it to McFarlane. After reading the deed of assignment, Dickson, the interpleader, examined seven witnesses, the object of whose testimony appeared to be, to prove

that Selmes commenced business in St. Louis in 1839, and continued it about one-and-a-half years, with McFarlane as his clerk; that, in the Spring of the year, 1841, McFarlane's name was used in the business; Selmes' sign was taken down, the goods removed to a house on the opposite side of the street, and McFarlane's name used, and his sign put up about the same time; that Selmes stated, that he sold out to McFarlane, and he also stated, as his reason for so doing, that he, Selmes, was greatly indebted in New York; that he wished to protect his St. Louis creditors with his property here; that he had been befriended in St. Louis, by persons to whom he was then indebted, and had made much money in his business there. One of these witnesses stated, that, "After the sale from Selmes to McFarlane, Selmes generally transacted the business, especially of buying goods, &c.; that whenever notes were given for the purchase of goods, after McFarlane's name was used in the business, McFarlane's name was generally signed as maker of the notes, and Selmes endorsed them." This witness stated, that he sold goods to Selmes for McFarlane; that he took notes from McFarlane to Pomeroy, the plaintiff, for goods sold, &c., which notes were endorsed by Selmes; the witness also stated, that after McFarlane had put up his sign as aforesaid, he had informed Pomeroy, the plaintiff, that Selmes had told him (the witness) about his affairs and business arrangements with McFarlane. Much other evidence was given by Dickson, the interpleader, to show that McFarlane bought much merchandize in his own name, for which he gave notes not endorsed by Selmes, and that he paid for goods also. It was also in evidence, that Selmes, after the sale of his stock in trade to McFarlane, acted as clerk to McFarlane. It was also in evidence, that the firm of Ruggles & Chase, before the sale by Selmes to McFarlane, had sold goods to Selmes, to the amount of \$2,000, which was paid by him, and that after the transfer of the stock in trade by Selmes to McFarlane, the same firm had sold goods to McFarlane, and had received therefor McFarlane's notes endorsed by Selmes, and that the said firm had refused to sell to Selmes, on his own credit, after he had transferred his goods to McFarlane.

On the part of Pomeroy, the plaintiff, it was given in evidence that Selmes told two wholesale houses in St. Louis, while he was doing business in his own name, that he was much involved in debt in New York, and that he feared he should be interrupted on that account. On this account, he afterwards stated to them he had transferred his goods to McFarlane, in order to protect his St. Louis creditors. To one of these two houses, he confessed judgment for a much larger amount than he owed, in order to secure them as well for moneys already due, as for future liabilities. It was testified that Selmes and McFarlane, in a conversation held with Johnstone, a partner in one of these houses, stated that the change from Selmes' name to McFarlane's was mere matter of form, to avoid Eastern creditors. This witness (Johnstone) stated, that he was a confidant and friend of Selmes, and was advised with in relation to this change. From the evidence, it appeared to be the practice of both of these wholesale houses to make both Selmes and McFarlane responsible, after the business was done under the name of McFarlane. One of the witnesses, who had sold goods to Selmes before the

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transfer to McFarlane, took a confession of judgment from both Selmes and McFarlane, to the amount of \$15,000, for the purpose of securing him for goods, sold after the transfer to McFarlane, as well as for the previous indebtedness of Selmes. Other testimony was given by the plaintiff, Pomeroy, the object of which was to prove, that Selmes was the principal person in the business of McFarlane, although the business was done under the sign of McFarlane, and Selmes professed to be the clerk of McFarlane.

The plaintiff then prayed the court to give the instructions following, to wit:

1st. If they believe, from the evidence, that the goods assigned to Dickson were, at the time, the property of Selmes, they will find for the plaintiff in attachment.

2d. If they believe, from the evidence, that Dickson, the interpleader, only claims the property as assignee of McFarlane, for the benefit of McFarlane's creditors, he does not stand in the character of a purchaser for a valuable consideration against the creditors of Selmes.

3d. That, although Selmes, in this transaction, might not be able to control or annul his own act in the transfer of the property in question to McFarlane, yet the creditors of Selmes are not included, and such creditors may pursue the property by attachment, in the hands of any person not a *bona fide* purchaser.

The court refused to give these instructions.

The court then instructed the jury as follows:

1st. The interpleader establishes a *prima facie* right to a recovery, by showing that the goods were in his possession at the time of levying the attachment, by virtue of an assignment from McFarlane, and that the goods attached were goods which had been, previous to the assignment, in the store and apparent ownership of McFarlane.

2d. The fact, that McFarlane was not in fact the owner of the goods, but that they were put in his possession by Selmes, merely as a cover to protect them from the creditors of said Selmes, is not sufficient to defeat the interpleader's right of recovery, unless the jury believe that the exact position which the parties, Selmes and McFarlane, occupied, was of such general notoriety as to be known to all those who traded with and credited McFarlane, and particularly the creditors for whose benefit the present interpleader is trustee.

3d. If a man, for the fraudulent purpose of protecting his property from his creditors, puts it into the hands of another, who holds himself out to the world as the owner thereof, and goes into business, and trades with this property, with the consent of the real owner; and if such holder of the goods, while they are thus in his possession, makes a general transfer thereof, for the benefit of his creditors, which were creditors created in the course of such business, either entirely or partly, such transfer is good and valid, even as against the attaching creditor of the real owner.

The court gave these instructions as above-mentioned, and then it is added, "to all which instructions, and decisions, and refusals, the plaintiff, by his counsel, excepts."

The plaintiff moved the court for a new trial, for reasons common to all suits,

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and therefore not necessary to be mentioned, and excepted to the overruling of his motion.

This suit was tried at the August term, 1842, and at the next term, to wit, at the November term of the said year, the bill of exceptions appears, from the record, to have been presented for the signature of the judge. In 1 Bacon, 530, it is said, that although no time be appointed by the statute, yet the bill must be presented at the same term. In 4 Peters, p. 107, the late Chief Justice Marshall says, "It would be dangerous to allow a bill of exceptions, of matters dependant on the memory, at a distant period, when they may not be accurately recollected, and the judge should not allow it."

To avoid the evils anticipated by the English courts, as well as those of the United States, from the neglect of the law-makers to declare at what time the bill is to be presented for the signature of the judge, and to leave as little room as possible to judicial discretion, our statute expressly provides, that the exceptions shall be taken, and the bill presented, during the progress of the cause. (See act to regulate practice at law, sec. 20, art. 4, p. 464 of Digest of 1835.) It would not, perhaps, be denied, that the bill might, by consent of parties, be presented for the judge's signature, even at the next term; but no such consent appears on record. For the construction given to the act, *Consaul vs. Liddel*, 7 Mo. Rep., 253, may be consulted; there the subject is more fully treated of. But the plaintiff also moved for a new trial, for common reasons, one of which is, that the verdict is against evidence. Although the bill of exceptions is wanting, and we have, properly speaking, neither evidence, nor exceptions to instructions, nor a motion for a new trial before us, yet it may not be amiss to take a view of the case, as presented by the evidence irregularly spread before us.

The plaintiff, here appellant, has proved to us that Selmes, the defendant, came to St. Louis in the year 1839, and expressed great solicitude to protect his creditors there from the claims sent against him by creditors left by him in New York; and for this purpose he, in the year 1841, sold, or offered to sell, to his clerk, McFarlane, all his stock of goods, and that stock being removed to another house, where McFarlane's sign was raised, the defendant (Selmes) there officiated as McFarlane's clerk. The notes here sued on were made by McFarlane to Selmes, and by him endorsed to the plaintiff, Pomeroy, probably for the very goods which Pine, a witness for Dickson, says that he sold to Selmes, for McFarlane; for he adds, that he took notes from McFarlane to Pomeroy, the plaintiff, for goods sold, &c., which notes were endorsed by Selmes. The witness further added, that after McFarlane put up his sign, as aforesaid, he had informed Pomeroy, the plaintiff, that Selmes had told him (the witness) about his affairs and business arrangements with McFarlane. It is not in evidence, that either Dickson, or those for whom he is trustee, were affected with any notice that Selmes had made his arrangement with McFarlane to sell his goods, merely to defraud his New York creditors; but, on their part, all appears fair; whilst it appears that Pomeroy, the plaintiff, sold his goods to this same McFarlane, to be retailed out by him, in his own name, and as his own property, relying on Selmes as his security. If the evidence even connected Selmes with McFarlane, as an associate

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in a fraudulent design to cheat Pomeroy, he has no right to complain of Dickson, and those for whose benefit the assignment is made, so long as they are not proved to be privy to the fraud. Pomeroy not only had the notice which all the rest of the world had, that McFarlane was doing business apparently on his own account, and, consequently, could sell and dispose of the goods as he pleased, but he was also informed of the fraudulent intention of Selmes to cheat his New York creditors, through the instrumentality of McFarlane. The instructions asked by Pomeroy ought never to have been given, the evidence being such as it is; on the contrary, the instructions asked by the interpleader were correctly given. But the plaintiff seemed to believe that the verdict was against evidence. The verdict ought to have been against Pomeroy, on the proof furnished by himself, and his adversary, who labored with more understanding, placed the matter in a very clear light against him by the evidence of Pine, who declared that he had informed Pomeroy of the business arrangements of Selmes and McFarlane. This Court is little inclined to weigh the evidence in a cause, after it has been left to a jury, with correct instructions. But if the evidence in this case, instead of being very abundant in favor of the appellee, were even very strong against him, the plaintiff, has precluded this Court from giving him any relief. When the plaintiff seeks to reverse a judgment, because the verdict is found against the evidence, he ought to set out all the evidence given in the cause, and to state in his bill of exceptions that all the evidence given in the cause has been set out. It does not appear in this case, that the appellant did set out all the evidence; on the contrary, it appears that there was evidence which he did not state in the bill of exceptions, such as it is, filed at the term after the trial of the cause.

The judgment of the Court of Common Pleas must be affirmed.

SCOTT, J.—In my opinion, Selmes and Pomeroy should have been regarded as partners, and the question would have arisen as to the right of one partner to make an assignment. About this, no opinion is given. The bill of exceptions not having been filed until a subsequent term, without the consent of parties, the judgment must be affirmed.

CHOUTEAU vs. SEARCY.

1. Hearsay evidence is incompetent to establish any specific fact, which, in its nature, is susceptible of being proved by witnesses who can speak from their own knowledge.
2. It is for the court alone to determine whether a witness is competent, or the evidence admissible. It is therefore erroneous, after permitting the testimony of a witness to go to the jury, to instruct the jury to disregard the testimony, if they should find that the witness was interested.
3. It is erroneous to instruct the jury to find for a party, upon the supposition that they find another fact to be true, when there is no evidence of the existence of such supposed fact.

Chouteau vs. Searcy.

APPEAL from St. Louis Circuit Court.

GAMBLE and BOGY, for Appellant.

1. To maintain the action, the plaintiff had to prove that the defendant was a member of the firm of Fontenelle, Fitzpatrick & Co., the drawers of the bill on which this suit is founded.

To charge a person as a partner, one of two things is necessary; he must have permitted his name to be used as one of the firm, or he must have participated in the profits or loss.—*Osborn vs. Bremer*, 2 Nott & McCord's Rep., 427; *Shubrick vs. Fisher*, 2 Dessansure, 148; *Gould vs. Gould*, 6 Wend., 263.

2. The letters read by the plaintiff do not prove a partnership between the drawees of the bill and the defendant, especially as they were written nearly a year after the bill of exchange on which the suit was brought was drawn.

3. No testimony was introduced about a participation in the profits.

4. If there was no proof of a partnership existing between the defendant and the firm of Fontenelle, Fitzpatrick & Co., the court ought to have given the instruction prayed for by the defendant before any testimony was given by the defendant.—*Russell vs. Bancroft*, 1 Mo. Rep., 662, 3.

5. The 1st and 5th instructions given by the court are erroneous; the first is too general, and calculated to mislead a jury, and the fifth was not sustained by any testimony given in the case.—*Cleaveland vs. Davis*, 3 Mo. Rep., 331, 2.

6. The instruction in relation to the admissibility of Mr. Sarpy's testimony was improper, as it presented a different issue to the jury from the one they were sworn to try; and it was purely and alone a question for the decision of the court.—*Fugate & Young vs. Carter*, 6 Mo. Rep., 267; *Newman vs. Lawless*, *Ibid.*, 279; 1 Philips on Ev., 18.

7. Sarpy was a competent witness.

8. The declaration of Fontenelle to Dougherty (see D.'s deposition) ought not to have been received as evidence.

9. For, although the declaration of each member of a firm, that he is a partner, is evidence to charge himself, it is no evidence of the fact against any other party. (2 Starkie on Ev., 25, 287; *Whitney vs. Ferris*, 10 Johns. Rep., 66; *Sweetney vs. Turner*, *Ibid.*, 216.) See the case of *Dixon*, impleaded with *Russell & Christy vs. Hood*, 7 Mo. Rep., 414, where the doctrine is examined.

10. The rule of court read and relied upon by the plaintiffs did not preclude the objection from being made to Dougherty's deposition, at the time it was made; but, on the contrary, it is expressly provided in the rule, that exceptions, on the ground of competency, may be made at any time.

11. If the exception to Dougherty's deposition had been sustained, there would have been no testimony to support the fifth instruction given by the court.

12. The evidence so strongly and decidedly preponderates against the verdict, that a new trial ought to have been granted.—*Singleton vs. Mann*, 3 Mo. Rep., 464; *Clemens vs. Laville & Morton*, 4 Mo. Rep., 80; *Dooly & Kirkland vs. Jennings*, 6 Mo. Rep., 61.

TOMPKINS, J., delivered the opinion of the Court.

This is an action of assumpsit, brought in the Circuit Court of St. Louis county, by Leonard Searcy, against Pierre Chouteau, junior. Judgment was given for Searcy, and, to reverse it, Chouteau appeals to this Court.

The action is founded on a bill of exchange, dated 16th of May, 1835, and alleged to have been drawn by Chouteau, as one of the firm of Fontenelle, Fitzpatrick & Co., on Pratte, Chouteau & Co.

To prove a partnership between Chouteau and Fontenelle, Fitzpatrick & Co., the plaintiff produced several witnesses, who testified, that many drafts similar to that here sued on were drawn by the drawers of this bill, on Pratte, Chouteau & Co., in favor of different persons, during the year 1835, and were duly paid, some by Chouteau himself, and others by Pratte, Chouteau & Co.

One Daugherty, for the plaintiff, testified, that he had learned from said Fontenelle, that the consideration of the draft in question was horses, wagons, &c., got for the mountain trade, from Searcy, the plaintiff, and that the firm of Pratte, Chouteau & Co. ought to have accepted the draft; that his general course of trade was through Pratte, Chouteau & Co., as he always understood, on which firm he was in the habit of drawing drafts, and his credit on the frontier was based exclusively on the credit of Pratte, Chouteau & Co. The same course of business, he always understood, was pursued by Fontenelle, Fitzpatrick & Co. during the years 1835 and 1836. It was in evidence, that Fontenelle had drawn on Pratte, Chouteau & Co. before he became associated with Fitzpatrick and others. The defendant excepted to the evidence given by Daugherty. The defendant produced one John B. Sarpy, who, being examined on his *voir dire*, stated, that he did not know whether he was interested in the event of the suit or not, and could not say whether he would be a gainer or loser by the disposition of the suit or not; that he was now a partner of Mr. Chouteau's; that he lived with Pratte, Chouteau & Co. in 1835; he was not certain, and could not say, whether he had an interest in the profits of the concern of Pratte, Chouteau & Co. at that time, or not.

The court permitted him to give evidence to the jury, but afterwards stated to the jury that they must disregard his testimony, on the ground of interest, if they find that he was a partner, or interested in the profits of the house of Pratte, Chouteau & Co. at the time the draft was drawn. The defendant excepted to this decision of the court.

The firm of Fontenelle, Fitzpatrick & Co., according to the plaintiff's evidence, was composed of Fontenelle, Fitzpatrick, Drips, Sublette, and Bridgor.

The plaintiff also read in evidence two letters proved to have been written by Chouteau, for the purpose of proving that Chouteau was, at the time of drawing this draft, a partner in the firm of Fontenelle, Fitzpatrick & Co. These letters bear date, one in March, 1836, the other in April of the same year; by the latter it appears, that Pratte, Chouteau & Co. (of whom the defendant, appellant, is one) sent one Pilcher to the mountains, to settle the accounts of Pratte, Chouteau & Co. with the firm of Fontenelle, Fitzpatrick & Co. In that letter,

this passage occurs: "In relation to the proposition made by us respecting an interest in the mountain business, he (Pilcher) is invested with full power in all matters relative to that business; and, should you conclude, after you all meet, to exclude Pratte, Chouteau & Co. from any interest, and rely on them as your equippers, you may rest assured of the most prompt and efficient support from them," &c.

The court instructed the jury—

1st, That if they find, from the evidence, that the drawers and Chouteau were embarked together in a fur-catching or trapping business, and were to share both the profits and loss, they must find for the plaintiff:

2d, That if they believed, from the evidence, that the firm of Pratte, Chouteau & Co., or any other firm of which Chouteau was a partner, received from the plaintiff, Searcy, horses, wagons and other property, for which he had not been paid, the plaintiff is entitled to recover the same on the common counts of the declaration, if they cover the nature of the demand.

To the giving of these instructions the defendant excepted.

The points to be decided are—

1st, Did the court commit error in permitting the evidence of Daugherty to go to the jury, and in directing the jury to disregard the testimony of Sarpy, in case they found him to be a partner, &c.?

2d, Did the court commit error in giving the instructions above mentioned?

1. The plaintiff incorporated in the bill of exceptions, and relied on a rule of the Circuit Court, which requires exceptions to depositions to be filed before the trial of the cause, &c., except "saving to the competency or relevancy of the testimony therein contained." The exception here being to the admissibility of the testimony, the rule of the Circuit Court is of no effect, and we are left to inquire if the testimony of Daugherty ought to have gone to the jury. All the testimony of Daugherty was what he had learned from Fontenelle, one of the drawers, and hearsay evidence is not admissible, in a case like this, to prove a specific fact. (Greenleaf, p. 112.) As it is the province of the jury to consider what degree of credit ought to be given to evidence, so it is for the court alone to determine whether a witness is competent, or the evidence admissible. Whether there is any evidence, is a question for the judge; whether it is sufficient, is a question for the jury. (1 Philips, 18.) The court, acting in its own province, decided that Sarpy was, in this case, competent to testify, and consequently his testimony was admissible: the court, then, committed error in afterwards telling the jury to disregard his testimony in case they should find him a partner of Pratte, Chouteau & Co.

2. The first instruction complained of is indeed very broad, viz.: if the jury find that the drawers and Chouteau were partners in the fur trade, and were to share both the profits and loss, they will find for the plaintiffs; this instruction is given, too, without any regard to the time when the partnership existed, whether before or after the drawing of the bill of exchange sued on. It was above stated, that it was the province of the court to say when there is no evidence, and that of the jury, to say when the evidence given is sufficient. In one of the letters

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of Chouteau, given in evidence by the plaintiff, dated eleven months after the date of the draft here sued on, it is said in express terms, that Mr. Pilcher was sent to the drawers, to ascertain whether Fontenelle, Fitzpatrick & Co. would receive Pratte, Chouteau & Co. as partners; and from the same letter it appears, that P., C. & Co. were, at the date of that letter, merely the equippers or wholesale creditors of Fontenelle, Fitzpatrick & Co.: it is not even pretended, in the evidence, that either Chouteau, or Pratt, Chouteau & Co., ever held themselves out to the world as the partner or partners of the drawers of the bill; for it cannot be contended seriously, that the mere acceptance and payment of bills, drawn by these drawees, will constitute Pratte, Chouteau & Co. their partners. The Circuit Court, then, committed error, in giving that instruction.

The second instruction is objectionable for the same reason as the first, to wit, that the plaintiffs had given no evidence whatever of a partnership, and therefore had no right to have any instruction from the court, as to the liability of Chouteau, in case they found an existing partnership; it was liable also to this objection, that there was no evidence that the property described in that instruction ever came from Searcy to the defendant, or to any firm of which he was a member. Even the testimony of Daugherty, exceptionable as it is, did not go to show that such property came from Searcy to Pratte, Chouteau & Co., or to any other firm of which Chouteau was a partner; he only stated that he learned from Fontenelle, that the consideration of the draft in question was horses, wagons, &c., got for the mountain trade from Searcy, but by whom got is not said. One would suppose they were bought by the drawers of the bill. Sarpy, in his evidence, states, that in March, 1836, nearly a year after the drawing of this bill, Fontenelle, Fitzpatrick & Co. sold to Pratte, Chouteau & Co. all the stock in trade in the mountains, consisting of all their horses, wagons, mules, tents, camp equipage and traps, &c. If it be admitted that these horses, wagons, &c., be the same which the drawers of the bill, one year before, perhaps, purchased from Searcy, most certainly Searcy could have no right of action on that account against Pratte, Chouteau & Co.

The appellant made other points, which it is not necessary to decide, because, if the same cause of action be again tried, he may, by using due diligence, prepare his testimony in time for the trial.

The judgment of the Circuit Court is reversed, and the cause remanded.

McFadin vs. Rippey.

McFADIN vs. RIPPEY.

1. In an action for use and occupation, an eviction of part of the premises may be shown in reduction of the rent; but a mere trespass, or illegal ouster, does not constitute an eviction.
2. An erroneous decision of the court, against the party obtaining the verdict, is not a sufficient ground for a reversal of the judgment, especially where, upon the merits, it would seem that the party was entitled to his judgment.

APPEAL from St. Louis Court of Common Pleas.

THOMAS, *for Appellant.*

1st. Appellant contends, that the court below erred in its instructions to the jury:

First, Because appellee having failed to go to the jury, on the written lease between him and appellant, and having based his right to recover on the ground of *use and occupation*, he can recover only so much as the premises were reasonably worth.—Rev. Code, 1835, p. 377, sec. 12.

Second, The agreement mentioned in the rejected lease, that appellant was to pay appellee so much a-year for the house rented, was not sufficient evidence (in fact, it was no evidence at all) from which the jury could infer that the house rented was worth so much. The lease having failed, all covenants and agreements contained in the lease must also fail.

2d. Appellant contends, that the court below erred in refusing the instructions asked for by the appellant's counsel:

First, Because appellee entered into a part of the demised premises, and evicted appellant therefrom, and therefore he was discharged from the payment of the whole rent; and this, that no man may be encouraged to injure or distrust his tenant in his possession.—6 Bac. Ab., 49; Coke's Litt., 148; b. Vent., 277; Ar-cough's case, 9 Coke, 135; Lewis vs. Payne, 4 Wend., 423; Dyett vs. Pendleton, 8 Cow., 730; Briggs vs. Hale, 4 Leigh's Rep., 484.

Second, Because appellee having evicted appellant from part of the demised premises, the appellant was entitled to a deduction of the rent; he was only liable upon a *quantum meruit* for the rest of the premises.—2 Leigh's Nisi Prius, 724; Stokes vs. Cooper, 3 Camp., 514; Tomlinson vs. Day, 2 B. & B., 680, (6 Eng. Com. Law Rep., 315.)

3d. Appellant further contends, that the court below erred in refusing a new trial, for the reasons above stated.

TRUSTEN POLK, *for Appellee.*

1st. The court below committed no error in refusing the instruction given to the jury.

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2d. The court committed no error in refusing to give the instructions prayed by defendant's counsel.

3d. The court below did right to overrule the defendant's motion for a new trial.

NAPTON, J., *delivered the opinion of the Court.*

This was a suit originally brought by Rippey before a justice of the peace, to recover one month's rent for a house in St. Louis. An account for this rent, \$33 33 $\frac{1}{3}$, was filed before the justice, and the suit having been commenced by attachment, a plea in abatement was filed, putting in issue the truth of the affidavit upon which the attachment issued, which was found for the defendant. Upon appeal to the Court of Common Pleas, the plaintiff got a verdict and judgment upon the issue on the plea of abatement, and went to trial upon the main issue in the cause.

The plaintiff proved, by a witness who was present at the transaction, that he rented to the defendant a dwelling-house in the city of St. Louis, for one year, at four hundred dollars. Objections were made by defendant to the price, on account of the cellar, which he alleged was wet; but plaintiff assured him he would keep the cellar dry, if, in order to do so, he had to fill it up to the floor; and thereupon the terms, as above stated, were agreed on. The defendant then entered on and occupied the premises until the expiration of the year. The witness, who was in the employment of the plaintiff, presented the account upon which this suit was brought to said defendant, who examined it, looked into his money-drawer, said he had not money enough to pay it then, and requested witness to call again. Witness called again, and defendant refused to pay it; but said there must be a deduction, on account of the cellar, &c. Witness stated, that he wrote a lease for the house for the said term. The lease being produced, and its execution proved, it was offered in evidence, but the counsel for the defendant objecting to it, on account of erasures, interlineations, &c., unexplained, the court excluded it, and the plaintiff then insisted on submitting his case to the jury, on the ground of use and occupation, the defendant objecting, but the court overruled his objections.

The defendant's counsel then introduced testimony to prove, that he was entitled to a deduction of the rent, because the plaintiff, of his own wrong, had deprived him of the use of the cellar, by filling it up with dirt, contrary to the agreement between the parties. Some testimony was offered on this point, but the court stopped the counsel, declaring the defence, if made out, inadmissible, and instructed the jury, that if they believed, from the evidence, that the defendant rented plaintiff's house, at the rate charged in the bill, and occupied the same during the time therein specified, they should find for the plaintiff.

The defendant asked the following instructions, which were refused:

1. If the plaintiff expelled or ousted the defendant from the premises, the defendant is discharged from the payment of the rent.

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2. If the plaintiff expelled or ousted the defendant from a part of the premises demised, the defendant is discharged from the payment of the rent.

3. If the plaintiff, after the defendant took possession of the house, filled up the cellar belonging to the house, so as to render it of no use or convenience to defendant, the defendant is entitled to a reduction of the rent.

The verdict and judgment were for the plaintiff.

The defence attempted to be set up in this case was properly excluded by the court. In action for use and occupation, an eviction of part of the premises may be shown in reduction of the rent; (*Tomlinson vs. Day*, 3 Brod. & Bing., 680); but a mere trespass, or illegal ouster, does not constitute an eviction. (*Hunt vs. Cope*, Cowper, 242.) The facts proved by the defendant, and those offered to be proved, could only have amounted to a trespass or an illegal ouster, and the instructions based on the hypothesis of a legal eviction, from the whole or part of the premises, were rightly refused by the court.

In *Brewer vs. Palmer*, 3 Esp. N. P. Cases, 213, it was held, that where it appears there was an agreement in writing, that agreement must be produced. There the agreement was not stamped, and therefore could not go in evidence. The plaintiff desired to go into evidence generally for use and occupation. Eldon, Chief Justice, said, "This was a specific contract between plaintiff and defendant, and the plaintiff is bound to show what that contract was; it may contain clauses which will prevent plaintiff from recovering; others for the benefit of defendant, which he had a right to have produced; but the contract not being stamped, it could not be given in evidence; therefore, the plaintiff must be nonsuited." (See *Rex vs. Inhab. St. Paul's*, 6 T. Rep., 452; *Preston vs. Mercereau*, 2 Black. Rep., 1,250.) If the occupation of land is founded on a written contract, even though it be defective, the writing must be produced, as being the best evidence of that contract. (*Buel vs. Cook*, 5 Conn. Rep., 206.)

Of course, the rule cannot apply, when the contract is not merely defective, but absolutely void.—*Tomlinson vs. Day*, 2 Brod. & Bingh., 679; *Jeffrey vs. Walton*, 1 Stark., 267; *Doe vs. Cartwright*, 3 B. & A., 326; *White vs. Wilson*, 2 Bos. & Pull., 116.

The bill of exceptions does not inform us of the character of the instrument offered in evidence by the plaintiff below. If a deed, the party had no right to proceed as for use and occupation; if an unsealed lease, he had, and the writing was proper evidence of the terms of the contract. It appears, that the instrument was excluded by the court as a nullity. This exclusion, whether right or wrong, was acquiesced in by both parties, and the plaintiff rested his case on the parol proof of the terms of the contract. The plaintiff had no other course, if the court was right in excluding his lease. An erroneous decision of the court against the party obtaining the verdict is certainly not a sufficient ground to require its reversal; especially where, upon the merits, it would seem the party was entitled to his judgment.

Judgment affirmed.

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The first part of the book is devoted to a general
description of the country and its inhabitants.
The second part contains a detailed account of the
history of the country from the earliest times
to the present day. The third part is a
description of the natural history of the country,
including the flora and fauna. The fourth part
contains a description of the social and political
conditions of the country. The fifth part is a
description of the economic conditions of the country.
The sixth part is a description of the religious
conditions of the country. The seventh part is a
description of the literary conditions of the country.
The eighth part is a description of the scientific
conditions of the country. The ninth part is a
description of the artistic conditions of the country.
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part is a description of the state conditions of the
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nation conditions of the country. The twenty-ninth
part is a description of the world conditions of the
country. The thirtieth part is a description of the
universe conditions of the country.

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2. An administrator may set up the infancy of his intestate as a bar to a demand founded on a bond executed by the infant. Although the defence of infancy is a personal privilege, yet the administrator is the representative of his intestate, and stands in his place *Parsons vs. Hill*, 135
3. In a suit brought by administrators or executors, on a cause of action accruing to them as administrators or executors since the death of their intestate or testator, the defendant cannot set-off a debt due him from such intestate or testator.
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the other refers to the unauthorized act of a stranger, and does not change the legal operation of the writing, so long as the original remains legible, and, if it be a deed, any trace remain of the seal *Medlin vs. Platte County*, 235

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2. See SET-OFF, 1.
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ASSIGNMENTS.

1. An assignment of all assignor's "goods and chattels, effects and property of every kind," for the purpose of paying debts due by the assignor, is not such an assignment of a bond held by the assignor at the time of the assignment, as will enable the assignee to maintain an action thereon in his own name, under the act concerning "bonds and notes."—Rev. Statutes, 1835, p. 105..... *Miller vs. Paulsel and Newman*, 355
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AUTHENTICATION.

The certificate of a clerk of a court of record, that "the foregoing contains a true and perfect copy of the last will and testament of Joseph Dial, deceased, and the record of probate remains in my office," is defective; it should have stated, "and of the record of probate remaining in my office:" it being not only necessary to set out a "true and perfect copy" of the will, but of the record of probate also... *Bright et al. vs. White*, 421

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BANK OF THE STATE OF MISSOURI.

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BILLS OF EXCHANGE.

1. Though the holder of a bill of exchange, payable at any number of days after date, is not bound to present the bill for acceptance, but may wait until it becomes due, and then present it for payment, yet if he does present the bill for acceptance, and acceptance is refused, he must give notice to those parties to whom he means to resort for payment, or they will be discharged from all liability. *Glasgow et al. vs. Copeland*, 268
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7. Notice of the dishonor of a bill or note may be given by any party to the same.
Glasgow vs. Pratte, 336
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9. Where the endorser, on the day the note became due, consented, on payment of half the amount of the note, that the maker might have another week to pay the balance due, it was held, that notice of non-payment of the balance at the end of the week was not necessary to fix the endorser *Ibid.*
10. Where a place of payment is designated in the body of the note or bill, a demand of payment at the place designated is necessary, in order to bind the endorser *Ibid.*
11. On the 16th of February, 1842, St. John drew his check on the Bank of Missouri, for \$1,000. On the 24th of the same month the check was presented to the Bank for payment, which was refused, except in the bills of the State Bank of Illinois. At the time the check was drawn, St. John had on deposit in the Bank of Missouri, \$1,702 69, in bills on the State Bank of Illinois and the Bank of Illinois. On the 27th of the same month he withdrew his effects from the Bank, they having depreciated in value between the delivery of the check and its presentment for payment. All the parties to the check resided in the city of St. Louis. *Held*, that the holder of the check could not, under these circumstances, recover the amount of the check from the drawer *St. John vs. Homans*, 382
12. The holder of a check should use diligence in presenting the same for payment, and if the drawer sustains any loss or injury from the want of such presentment, he will be discharged *Ibid.*
13. It is not necessary, in order to discharge the drawer of a check for want of due presentment, that he should have money in the hands of the drawee at the time of drawing the check: it is sufficient that he had property in the hands of the drawee. *Ibid.*
14. The drawing of a check is not a transfer or assignment of the amount for which it was drawn, to the holder *Ibid.*
15. Notice of the dishonor of a bill may come from any person who holds the bill when it is dishonored, or is a party to the bill, and the holder may avail himself of the notice given in due time, by any other party to the bill, against any other person upon the bill who would be liable to him, if he, the holder, had himself given due notice of the dishonor *Glasgow vs. Bank of Missouri*, 443
16. Where notice of the dishonor of a bill is given by an endorser, and his name is subsequently erased from the bill by the holder, the liability of prior endorsers will not be affected thereby: the holder of a bill having the right to strike out the names of as

- many endorsers as he sees proper, provided they are subsequent to the endorsement of the party whom he seeks to hold liable *Ibid.*
17. It is not indispensable for the notice of the dishonor of a bill to be sent to the post-office nearest to the residence of the party, nor even to the town in which he resides, if it be, in fact, sent to the post-office to which he usually resorts for his letters.... *Ibid.*
 18. Notice of non-payment or non-acceptance of a bill of exchange must, in general, come from the holder, and should be given by some servant or agent who will be competent to prove the notice..... *Walker vs. Bank of Missouri,*
 19. A notice not signed by any person is insufficient..... *Ibid.*
 20. The endorsement of a note by an endorser to the Bank of the State of Missouri, *prima facie* vests the property in the note in the Bank, and raises the presumption that the note was discounted by the Bank..... *Ibid.*

BILLS OF EXCEPTIONS.

1. Where an objection was made to the introduction as evidence, the bill of exceptions should state the specific grounds upon which the objection was made; for unless the party points out the specific objections in the Circuit Court, and the bill of exceptions shows what those objections were, the case may be decided upon one point by the Circuit Court, and reversed upon another by the Supreme Court. *Rev. Stat. 1835, title, "Practice in the Supreme Court," sec. 41, p. 522* *Field vs. Hunter, 128*
2. See *PRACTICE*, 5, 10, 14, 36.
3. A bill of exceptions cannot be tendered and signed at a subsequent term of the court, without the consent of the other party *Pomeroy vs. Selmes, 727*

BONDS AND NOTES.

1. An endorsement on a bond, made subsequently to its execution, is no part of the bond; otherwise, where the endorsement is made at the time of its execution and delivery.
Nicholas, administrator, vs. Douglass et al., 49
2. R., as the security of S., entered into bond to the sheriff of St. Louis county, in the sum of *thirteen* dollars, conditioned for the return, &c., of property levied on in attachment against S., &c., stated in the condition to be worth *seven hundred* dollars. The Circuit Court, on motion, under the act of February 15th, 1841, concerning attachments, (*Laws of Mo., session acts 1840-41, p. 15,*) rendered judgment on the bond, against R., for the sum of six hundred and sixty-two dollars and eighty-three cents. *Held:*
 1. That although it might be conjectured, from the condition, that there was an omission of a part of the sum designed to be inserted in the penal part of the bond, yet, as it was free from ambiguity on its face, the application of the ordinary rules of construction, in cases of ambiguity, were not applicable, and the court, therefore, erred in rendering judgment for more than the penal sum.
 2. It is the peculiar province of courts of equity to relieve against mistakes and omissions; but courts of law act on the contracts of parties as they find them, only applying the rules of construction where the instrument is ambiguous on its face. *Rayburn vs. Deaver, 104*
3. Where a note is not negotiable, within the meaning of the sixth section of the act concerning bonds and notes, (*R. S. 1835, p. 105,*) for want of the words, "negotiable and payable," the nature of the defence of the maker is not changed by the assignment, although the note may purport to be payable "without defalcation."
McGuire vs. Conran, 107
4. A. executed to B. his negotiable promissory note, by whom it was transferred to the Mutual Insurance Company, and by that company transferred, after due, to C. The time the note became due, A. had on deposit with said company money nearly sufficient to pay the note, and tendered to the company his check on it for the amount on deposit, and a small sum in money, making together the amount of the note. The company at the time was the holder of the note. *Held*, that this was a sufficient tender, and that the note being transferred to C., the plaintiff, after due, was

- taken by him subject to all the defences and equities existing between the original parties *Shipp et al. vs. Stacker et al.*, 145
5. Although the assignee of a note not negotiable cannot sue a remote assignee at law, yet he may in equity. A court of equity will give a remedy by making him immediately liable who is ultimately liable, on the principle that the court entertains jurisdiction to avoid multiplicity of suits: and in such case the original assignor may make the same defence against the remote that he could make against his more immediate assignee..... *Smith vs. Hardy*, 559
 6. Where the assignee of a note not negotiable sues the maker before a justice of the peace, and the execution is returned by the constable unsatisfied for want of personal property, and a transcript of the judgment is filed in the office of the clerk of the Circuit Court, but no execution is issued thereon by the clerk, the assignee will not be considered as having used that "due diligence in the institution and prosecution of a suit" against the maker, that will enable him to maintain an action against the assignee for the amount due. An execution should have issued from the clerk's office, otherwise it would not appear but that the money could have been made out of the real estate of the maker.—See act of February 4, 1835, concerning "Bonds and Notes," R. S. 1835, p. 105..... *Jacobs vs. McDonald*, 563
 7. Where an instruction is given with reference to the provisions of a particular statute, it is better that the instruction contain the language of the statute, as where the statute uses the words "due diligence." (See act concerning "Bonds and Notes," R. S. 1835, p. 105.) It is improper to substitute for them the words "reasonable time." *Ibid.*
 8. It is not every species of neglect, or failure to perform his duty, on the part of an officer, which will deprive an assignee of a note not negotiable of his recourse against the assignor. The misconduct of the officer must be such as will clearly give a recourse against him for the debt. Therefore the defendant, the assignor of the debt sued on, offered to prove that the maker had an interest in certain personal property, sufficient to pay the debt, but that the constable failed to levy upon and sell the property. It was held, that such facts did not affect the rights of the assignee, and therefore the evidence was properly excluded..... *Ibid.*
 9. Where the note is assigned, the assignee takes the place of the assignor, and he is required to use that diligence that a prudent man would use to collect the debt had it been his own. He is required to act as a prudent man would act who had no recourse against another in the event of his losing the debt *Ibid.*
 10. A. executed his bond to B., who assigned it to C. Some time afterwards C. brought the bond to B. with his assignment thereon erased, and B. thereupon, at the request of C., assigned the bond to E.: *Held*, that the erasure of the assignment did not divest C. of the legal title to the bond, and consequently that E. could not sue in own name, as the legal owner thereof *Davis vs. Christy*, 569
 11. It is well settled, that the holder of a promissory note, whether negotiable or not, may strike out the blank endorsements; such, however, does not appear to be the law with regard to endorsements in full, which confer a legal title to the instrument.... *Ibid.*
 12. A note for a certain sum, "to be paid in cut-stone work," is a note for personal services, and not assignable.—See *Bothick's Administrator vs. Purdy*, 3 Mo. Rep., second edition, p. 60..... *Prather, vs. McEvoy, to use of Neilson*, 661
 13. See PRACTICE, 40.
 14. See EVIDENCE, 32.

BOUNDARIES.

1. In ascertaining the boundaries of lands purchased from the United States according to the government surveys, the boundary lines actually run and marked by the public surveyors are to be taken and considered as the true boundaries, although such marked boundaries may not correspond with the courses and distances. The sections and their subdivisions, thus ascertained, are to be considered as containing the exact quantity expressed in the returns of the surveyors, whatever may be the actual

quantity contained in such sections and subdivisions.—See S. C., 6 Mo. Rep., p. 219.

Campbell vs. Clark, 553

2. In surveys of land, it is a well-settled rule that the courses and distances must yield to an ascertained corner or boundary; and although such corner or boundary may have been effaced or destroyed, yet if the locality can be established by real testimony, it will prevail, and the courses and distances must yield *Ibid.*
3. When the boundaries of land are fixed, known and unquestionable monuments must govern, although neither courses nor distances, nor the computed contents, correspond with such monuments *Ibid.*

BURDEN OF PROOF.

Where the burden of proof lies upon one party, it cannot be thrown upon the other party by the form of the pleading. *The State, to use of Sublette and Campbell, vs. Melton et al.*, 417

CARONDELET COMMONS.

Ejectment.—The land in controversy was claimed by the plaintiff, as lessee of the town of Carondelet, being part of a tract claimed by that town as commons. The town claimed the commons by virtue of a concession from Don Zenon Trudeau, lieutenant-governor of Upper Louisiana, dated 7th of December, 1796. A survey of the commons was commenced in 1797, by Soulard, the surveyor-general, but not completed. On the 7th of June, 1808, the inhabitants of Carondelet filed, with the recorder of land titles, a notice of the claim. The board of commissioners, on the 2d of January, 1812, rejected the claim. The recorder of land titles, on the 22d of August, 1834, certified that the claim was confirmed by the 1st section of the act of Congress of June 13, 1812, and several acts supplementary thereto. A survey of the commons was made in March, 1834, in pursuance of instructions from the surveyor-general's office, dated February 16, 1834. This survey was a continuation of the western line of the commons, as commenced by Soulard in 1797, and embraced 9,905 29-100 acres. The original claim of the town was for 6000 arpens only.

Defendant claimed under Gabriel Cerre, and proved notice to the recorder of land-titles on the 28th of November, 1812, and a concession dated 15th March, 1789. In February, 1833, the board of commissioners recommended this claim, amounting to 6000 arpens, for confirmation, and it was confirmed by the act of 4th July, 1836. The claim of the defendant was embraced within the lines of the commons claimed by the town of Carondelet.

TOMPKINS, Judge, was of opinion that no title in the town of Carondelet was shown to any commons.

SCOTT, Judge, was of opinion, that the confirmation of the claim of the town was not by metes and bounds, and only so much land passed as was actually claimed by the inhabitants in the notice filed with the recorder of land titles. They claimed 6000 arpens, and were entitled to that quantity in the direction indicated in their claim; and if that quantity could be obtained without interfering with the rights of others, they could not be disturbed in the enjoyment of their possessions.

As the claim was for a certain quantity of land, and not by metes and bounds, the town was entitled to the quantity claimed, and no more.

NAPTON, Judge, was of opinion, that the claim of the town of Carondelet was for a specific tract of land, designated by metes and bounds, and that the quantity claimed could not be permitted to control where specific boundaries were fixed; that whatever ambiguity there might have been in the decree of the lieutenant-governor, Trudeau, in relation to the western line mentioned in that decree, was removed by his authority in 1797, and that this survey being before the board of commissioners, and communicated to Congress, was sufficient to apprise Congress of the extent and boundaries of the land claimed, and that the act of Congress of 13th June, 1812, confirmed the claim to the commons to the full extent claimed before the board of commissioners, by virtue of said decree.

Judges TOMPKINS and SCOTT concurred in the reversal of the judgment of the Circuit Court, which was rendered for the plaintiff below.—NAPTON, Judge, dissenting.

Dent vs. Bingham, 579

CHANCERY.

1. A court of equity has no power to decree a partition of personal chattels between joint-tenants, or tenants in common..... *Gudgell et al. vs. Mead et al.*, 53
2. An appeal will not lie from a decree of a court of equity, that partition be made between the parties. Such decree is interlocutory *Ibid.*
3. *In Chancery*.—The bill set forth, that, in the year 1836, complainant and others became the securities of one M. in his official bond, as collector of the revenue; that M. died in 1827, insolvent, and that defendants administered on his estate, and have still in their hands the greater part of the assets; that, in 1841, complainant was sued on said bond, and that the State recovered judgment against him, as such security, for two hundred and sixty-four dollars, all of which he was compelled to pay, as his co-securities were insolvent; that said suit was not commenced until after the lapse of three years from the date of the letters of administration, &c.

The bill prayed for an injunction restraining the administrators from making distribution, and that they be decreed to pay over to complainant the amount paid by him to the State. *Held*:

1. That, under the 15th section of the act of March 7th, 1835, concerning courts, (R. S., p. 156,) the County Court has exclusive original jurisdiction over all the matters detailed in the first six clauses of that section, concurrent jurisdiction with the Circuit Court in the cases enumerated in the seventh clause, and exclusive original jurisdiction or power to perform various acts specified in the last five clauses. The decision of this Court, in *Erwin vs. Henry*, (5 Mo. Rep., p. 469,) that the exclusive original jurisdiction of the County Court extended only to the cases enumerated in the first clause of said section, and that courts of chancery and the county courts had concurrent jurisdiction in the cases enumerated in the remaining clauses of said section, is therefore overruled.
2. That the general control over executors and administrators, given to the circuits courts by the sixth clause of the eighth article of said act concerning courts, is limited in its application to such cases as are not specifically provided for in other parts of the same act, and the act concerning administration.
3. That the right of a security to recover from his principal the amount which he has paid in his behalf, is a right which may be established in a court of law; but his right to stand in the place of the creditor as to all securities, funds, liens and equities which he may have for the same debt, is a right which can only be established in a court of equity.
4. That courts of equity have jurisdiction in this and similar cases, in which sureties wish to avail themselves of every advantage which the creditor had against their principal. The amount involved places this case within the concurrent jurisdiction of the county and circuit courts, and the demand being purely equitable, it falls to the Chancery side of the Circuit Court.
5. That, as the complainant's cause of action did not accrue until the lapse of three years after the granting of letters of administration to defendants, he was not barred by the limitation of three years, in the administration act. *Miller vs. Woodward & Thornton, administrators*, 169
4. Equity cannot relieve against a forfeiture where the party applying for relief is in default..... *Broaddus vs. Ward et al.*, 217
5. After the dissolution of an injunction, staying proceedings at law, and the awarding of damages, the court, as a court of chancery, has nothing to do with the case; the parties should be left to proceed in their suit at law.... *Powers & Ashley vs. Waters*, 299
6. Although it is well settled, that a purchaser with notice of the equity of another, from one who purchased without such notice, may protect himself under the first purchaser, yet if there are suspicious circumstances attending the purchases which are unexplained, and the answer of the first purchaser is evasive, and does not respond to all the material allegations in the bill, it may be inferred that the first purchaser

- was not a *bona fide* purchaser, and consequently that the second purchaser was not protected under the first..... *Halsa vs. Halsa*, 303
7. A specific performance of a contract is not a matter of course, but rests entirely in the discretion of the court, upon a view of all the circumstances of the case. If there has been any unfairness or want of good faith, or improper conduct of any kind, on the part of the party, asking the aid of the court, a specific performance will not be decreed..... *Durrells vs. Hook*, 374
8. See SUBSTITUTION.
9. Although the assignee of a note not negotiable cannot sue a remote assignee at law, yet he may in equity. A court of equity will give a remedy by making him immediately liable who is ultimately liable, on the principle that the court entertains jurisdiction to avoid multiplicity of suits; and in such case, the original assignor may make the same defence against the remote, that he could make against his immediate assignee..... *Smith vs. Harley*, 559
10. It is generally true, that a court of equity has no jurisdiction where a party had a complete defence at law, and failed to make it; but if the defence be of such a character that it might be made either at law or in equity, the latter court will afford relief, though the party has neglected to make his defence at law.
Benton et al. vs. Stevens et al., 622
11. Where covenants are mutual and independent, and an action is brought thereon by one of the parties, who is a non-resident or insolvent, such non-residence, or insolvency, may be a good ground for the interposition of a court of equity, in order to prevent irreparable injury to the other party..... *Ibid.*

CHANCERY PLEADINGS.

1. When a plea to a bill in Chancery is entered, if its sufficiency is questioned, it is not demurred to, but is set down for argument, and, if deemed bad, is overruled; otherwise, it is allowed..... *Roundtree vs. Gordon*, 19
2. A plea to a bill in Chancery must always be put in upon oath, unless it is a plea to the jurisdiction of the court, or of a matter of record, and such like matters, whose truth is apparent. And if a plea which is not sworn to is set down for argument, which is equivalent to a demurrer in proceedings at common law, it is no waiver of the irregularity..... *Ibid.*
3. A special replication is unknown in modern Chancery practice. When the defendant introduces new matter into his plea or answer, which makes it necessary for the complainant to put in issue some additional fact in avoidance of such new matter, he is permitted to amend his bill, and to the new matter thus introduced by way of amendment the defendant puts in a further answer, and thus has the benefit of a special rejoinder. If a material charge is omitted in the bill, and it is alleged in a special replication, the defendant is not bound to notice it, nor is he affected by it..... *Ibid.*
4. When an answer in Chancery is responsive to the bill, and positively, plainly and precisely denies the matter of equity in the bill, it is to be taken as true, unless it be contradicted by two witnesses, or by one witness and corroborating circumstances; but where the answer is thus contradicted, in any one or more important particulars, it is deprived, in all other respects, of that weight which is allowed to answers by the rules of a court of equity; for, being falsified in one thing, no confidence can be placed in it as to others, according to the maxim, *Falsum in uno, falsum in omnibus*..... *Ibid.*
5. The rule in Chancery, that under the prayer for general relief a party may have any relief to which he is entitled, is to be understood, that the relief granted is to be founded on the facts stated in the bill, and not such as may be proved at the hearing.
McNair vs. Biddle, 257
6. *In Chancery*.—The bill alleged, that complainants purchased of A., as the agent of B., certain horses, for which complainants executed their two notes to B. for \$2,800 each; the first note payable on the first of January, 1840, and the second one year thereafter. At the time of the purchase A. executed to complainants a bill of sale for the horses, in which he *bound himself, as agent*, to deliver to complainants perfect

pedigrees of the horses. In the bill of sale A. described himself as agent of B., but signed the bill in his own name. B. brought suit on the first note, and recovered judgment thereon. The complainants further charge, that the pedigrees were never delivered to them, by which they sustained damage to the amount of the first note, and that defendants, A. and B., were non-residents of this State, so that no process could be served upon them, and therefore prayed a perpetual injunction against the collection of the judgment.

The answer of B. admitted the sale of the horses, and the authority of A. to sell, but denied any authority in A. to bind B. to furnish pedigrees.

Held: That the bill was properly dismissed, for want of equity. The bill of sale, signed by A., in his own name, was binding on himself alone, and the complainants did not charge that B. had, in any manner, recognized any authority on the part of A. to bind B. to furnish the pedigrees. The bill was further defective, in not making a tender to B. of the amount admitted to be due him.

Overton et al. vs. Stevens et al., 622

CHANGE OF VENUE.

1. See WITNESSES, 606.
2. The act authorizing a change of venue in criminal cases is imperative whenever a case is made out in conformity with its requisitions, and it is not left to the discretion of the court, when the requirements of the act are complied with, to grant or refuse the application as a mere matter of discretion..... *Freleigh vs. The State*, 606

COLLECTION OF THE TAXES.

See OFFICE AND OFFICER, 5 and 6.

COMMON CARRIER.

1. Where a carrier undertakes to deliver goods at a certain point, "with privilege of re-shipping" reserved in the bill of lading, his liability as common carrier continues until the goods are safely delivered at the point of destination. The privilege of re-shipment merely enables him to carry the goods in his own or some other vessel, but does not discharge him from any liability not excepted in the contract. Therefore, if the boat on which the goods are re-shipped deviates from her route, and is lost, the carrier is liable..... *Little & Tompkins vs. Semple*, 99

CONDITION.

1. Where a party promises to pay a certain sum "in consideration of their (the promisees) assuming debts of W. W." to the amount of said sum, the assumption of the debts is not a condition precedent to the payment of the money. The promise is absolute and unconditional..... *Overton vs. Curd et al.*, 420
2. Where no time is fixed for the performance of that which is the consideration of the promise, the promise will be considered unconditional..... *Ibid.*

CONSIDERATION.

1. Defendant, as assignee of a promissory note executed by plaintiff to A., promised plaintiff, that if he would renew the note, he would pay him all he might be compelled to pay on account of certain judgments rendered against him, as garnishee in suits by attachment against A. Plaintiff then made some payments on the note, and gave his new note to defendant for the remaining part due: *Held*, that such payments, and the execution of the new note, constituted a sufficient consideration to support the promise..... *Turner vs. Crigler*, 16
2. See PRINCIPAL AND SURETY, 1.
3. The seventh section of the fifth article of the act relating to "Justices' Courts," (Rev. Stat., 1835, p. 359,) allowing the obligor of a bond to impeach the consideration thereof, applies only to causes originating before a justice of the peace. In suits on bonds originating in the Circuit Court, a partial, or even total, failure of consideration cannot be pleaded in bar of the action..... *Buford, administrator, vs. Byrd*, 240
4. A father promised his son, that if he would remove to a piece of land belonging to, and near the residence of the former, he would give the land to his son. The son, at the time of the promise, had a family, and lived in a distant part of the country.

He accepted the offer and removed to the land, and his father assigned to him the certificate of entry of the land, in these words: "I, Joseph Halsa, do *sine* the within certificate over to Amos Halsa, which is to empower him to lift the deed in his own name.—April 18th, 1835.—JOSEPH HALSA." *Held*:

1. That it was not necessary that the assignment should state the consideration of the transfer, for it is not necessary that the consideration of the agreement should be in writing, in order to take the transaction out of the operation of the statute of frauds.
2. That the removal of the son to the land, upon the faith of the promise made by his father, was a valuable consideration to support such assignment.
3. Benefit or advantage to the grantor is not the test of the value of a consideration. Inconvenience, trouble, or expense, borne by the grantee, will make the consideration as valuable in law as benefits conferred on the grantor.
Halsa vs. Halsa, 303
5. An agreement by the holder of a bill of exchange, giving time to the acceptor, will not release the endorser, unless the agreement be made upon a sufficient consideration. To discharge a security, the contract must be such as will prevent the creditor from suing the principal debtor..... *Harks vs. Bank of Missouri*, 316
6. It is not necessary that a consideration should be adequate in point of value, in order to be *sufficient*. If the least benefit or advantage be received by the promisor from the promisee or a third person, or if the promisee sustain the least injury or detriment, it will constitute a sufficient consideration to render the agreement valid... *Ibid*.
7. The Bank of Missouri, as holder of a bill of exchange, agreed with the acceptor to receive from him twenty per cent. on the amount of the bill every four months, and interest in advance until the bill should be fully paid, and that no suit should be brought against the holder or endorser if the payment should be made as agreed upon. In pursuance of this agreement, one payment was made by the holder, but no further payment was made. It was contended by the endorser, that the payment of the interest in advance was a good consideration for the agreement to give time to the holder, and consequently discharged the endorser. *Held*: That if the Bank had the right to receive the interest in advance, there was no sufficient consideration for the promise; and if the contract was usurious, it could not have availed the Bank, for the usurious interest might have been recovered after it was paid; that the contract did not prevent the Bank from suing, as the money might have been returned or tendered, and the contract would have thereby been rescinded..... *Ibid*.
8. A. obtained judgment in the Circuit Court against B., who afterwards died leaving the judgment unpaid. C., his widow, in order to remove the supposed lien of the judgment from the real estate of B., executed her note to A. for the amount of the judgment, secured by a mortgage on her own real estate. A. accepted the note and mortgage in lieu of the judgment, and relying solely upon his new security, suffered the three years allowed for the presentation of demands against estates to elapse, without presenting the judgment for allowance against the estate of B.
The only question presented was, whether the note and mortgage were given upon a sufficient consideration. *Held*: That the consideration was sufficient.
Mullanphy, to use of O'Fallon, vs. Reilly, 675
9. Any loss or injury sustained by a plaintiff, at the request of the defendant, forms a good consideration to support a promise to pay, provided the promise is fairly obtained..... *Ibid*.
10. A valuable consideration is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made..... *Ibid*.
11. A promise by the wife, after the death of her husband, to pay a bill, for medical attendance upon the family of the deceased during his life-time, is not founded upon a good consideration: even though a part of the bill was for attendance upon the wife, and upon slaves, her separate property..... *Kennerly vs. Martin*, 698

CONSTABLES.

1. Where a constable offers in evidence the verdict of a jury summoned "to try the right

- of property between the defendant in the execution and the claimant," under the 14th, 15th, and 16th sections of seventh article of the act relating to justices' courts, (R. S. 1835, p. 367,) it must appear that the jury were sworn by some person empowered to administer oaths. Although the statute declares, that "the constable shall administer an oath to each of the jurors," &c., yet any qualified officer may administer the oath..... *Brown vs. Burrus*, 26
2. Where the claimant of the property levied upon withdraws his claim before the trial of the right of property, the constable is not warranted in proceeding any further with the trial..... *Ibid.*
 3. See RETURN, 1.
 4. The securities of a constable are not liable, on the official bond, for the amount of notes, &c., placed in his hands for collection, and by him collected; they are only liable where the money has been paid to the constable after the commencement of suit, or after judgment. (See "Justices' Courts," art. 2, sec. 21, and art. 7., sec. 18, R. S. 1835, p. 352, 367.)..... *Bogart vs. Green and Rogers*, 115
 5. See OFFICE AND OFFICERS, 6, 7.
 6. The 5th section of the act of January 4, 1841, concerning the liability of county officers on their official bonds, (Session acts of 1840-'41, p. 31, 32,) providing that "persons injured by the neglect or misfeasance of any such officer may proceed against such principal, (or) any one or more of his securities, jointly or severally, in any proceeding authorized by law against such officer for official neglect or injury," does not render liable the securities of a constable to the penalty imposed upon such officers for failing to return an execution, by the 8th section of the act of March 17, 1835, concerning constables. (R. S. 1835, p. 117.) Proceedings under this section are confined to the constable; the sureties are not embraced within its provisions.

McCurdy vs. Brown & Gibson, 549

CONSTABLE'S RETURN.

1. The return of a constable on a writ is only *prima facie* evidence of the truth of the facts therein contained..... *Perryman et al. vs. The State, to use, &c.*, 208
2. See RETURN, 1.

CONSTITUTIONS.

1. The Court adhere to the decision made in *Maupin vs. Parker*, (3 Mo. Rep., 219, 2d edit.,) viz., that the acts of the General Assembly, providing for the sale of the township school lands, are not repugnant to the nature of the grant, and do not conflict with any provision of the constitution of Missouri.
Payne and Riggins vs. Saint Louis Co., 473
2. The act of December 19, 1842, "to abolish lotteries, and to prohibit the sale of lottery tickets in this State," is constitutional..... *Freleigh vs. The State*, 606

CONSTRUCTION.

1. See BONDS, 2.
2. See COVENANTS, 4, 5.

CONTINGENCIES.

1. A. built a boat for B., for which the latter was to pay a stipulated price *so soon as there was sufficient water in the Grand River to let the boat out.* Held: That A. could not recover the price until the happening of this contingency, although B. had, in the mean time, sold the boat..... *Peery vs. Cooper*, 205
2. When contingencies are so remote and uncertain that they may never happen, or where, indeed, it is reduced to a certainty that they never can happen, the party may, in certain cases, be relieved in a court of equity, and even courts of law have sometimes disregarded the condition in such cases; but not where the happening of the contingency, as in this case, is morally certain..... *Ibid.*

CONTINUANCE.

1. Where suit was commenced in the St. Louis Court of Common Pleas, prior to the passage of the act of January 16, 1843, concerning courts, providing, that "after the issues shall have been made up, the suits shall stand continued until the second

- term," (Session acts of 1842-43, p. 58,) and after the passage of that act the plaintiff amended the declaration by filing additional counts, it was held, that the defendant was entitled to a continuance, although the 9th section of the act of January 21, 1841, establishing the Court of Common Pleas, (Session acts of 1840-41, p. 51,) made such cases triable at the first term, where personal notice had been served on the defendant..... *Tunstall vs. Hamilton*, 500
2. Where the plaintiff amends the declaration in a matter of substance, the defendant will be entitled to a continuance.— See *Risher vs. Thomas*, 1 Mo. Rep., 529, second edit.; *Demsey vs. Harrison & Glasgow*, 4 *Ibid.*, 270..... *Ibid.*
 3. Where a continuance is refused a party who has used due diligence to procure testimony, and has failed, such refusal will be good ground for reversing the judgment.— See *McLane vs. Harris*, 1 Mo. Rep., 501, second edit.; *Riggs vs. Fenton*, 3 *Ibid.*, 28; *Moore & Porter vs. McCullough*, 6 *Ibid.*, 444..... *Ibid.*
 4. The granting of continuances is a matter of discretion in the court before which the cause is tried; and although the unsound exercise of this discretion is matter of error, yet, a plain and palpable case must be made out, to authorize the interference of the Supreme Court..... *Freleigh vs. The State*, 606
 5. It is not a sufficient ground for a continuance, that the witness summoned to prove a particular fact was not *in attendance*, unless it appears, from the affidavit, that the fact could not be proved by any other person whose attendance could have been procured..... *Ibid.*
 6. Where replications are filed at a subsequent term of the court, although without any objection, the defendant is entitled to a continuance.. *Bunding et al. vs. Blumenthous*, 695

CONTRACTS.

1. Where there has been no contract for the payment of interest, an action cannot be sustained for the interest after the payment of the principal; but otherwise, where there has been an express agreement to pay the interest as well as the principal.
Stone vs. Bennett, 41
2. S. agreed to pay to B. one thousand dollars at the expiration of five years from the date of the agreement, and one hundred and twenty dollars interest, per annum, thereon, during the time, with the privilege of discharging the whole at any time; and further stipulated, that if he should, "at any time before the falling due of said bond, pay any part of it, he shall be exonerated from interest on that part of the one thousand dollars paid," and interest on the remainder should be calculated in the ratio of one hundred and twenty to one thousand. Held: That the true construction of this agreement was, that upon the payment of the principal, or any portion thereof, S. would be exonerated from the payment of accruing interest on the principal, or part thereof, paid, but not from the payment of interest that had accrued up to the time of such payment..... *Ibid.*
3. Where a person contracts for the service of another for an indefinite time, the contract to be terminated at the pleasure of either party, and the servant to be furnished with suitable clothing, &c.: if the employer fails to furnish the servant with such clothing, and the latter leaves his service in consequence thereof, the servant is entitled to recover as much as his services were worth..... *Sisk vs. Cunningham*, 132
4. A. built a boat for B., for which the latter was to pay a stipulated price so soon as there was sufficient water in the Grand River to let the boat out. Held: That A. could not recover the price until the happening of this contingency, although B. had, in the mean time, sold the boat..... *Peery vs. Cooper*, 205
5. When contingencies are so remote and uncertain that they may never happen, or where, indeed, it is reduced to a certainty that they never can happen, the party may, in certain cases, be relieved in a court of equity, and even courts of law have sometimes disregarded the condition in such cases; but not where the happening of the contingency, as in this case, is morally certain..... *Ibid.*
6. B. contracted, in 1825, with the proprietors of the town of Rocheport, for the purchase of a lot in that town, by which he bound himself to erect on said lot a dwelling-house of a certain description, within two years, otherwise the lot was to revert to

- the proprietors. B. neglected to build any house on the lot, and the court being of opinion that he had no sufficient excuse for failing to comply with his contract in this respect, refused to decree a specific performance..... *Eroaddus vs. Ward et al.*, 217
7. Plaintiffs, who were the owners of a ferry-boat, brought suit against defendant, under the act concerning boats and vessels, for an injury to their reversionary interest in the boat. Some of the plaintiffs were minors, and sued by guardian. It appeared, that the adult plaintiffs had leased the boat to one Ward, but it did not appear that the lease was executed by the infant plaintiffs, or their guardian: *Held*, that the infants, by joining in the suit, had affirmed the contract of the other part-owners.
Ward vs. Steamboat Little Red, 358
8. An infant can become a party to a contract, made without authority from him, by his subsequent adoption of it, as well as by his previous express consent. If an infant affirms a contract, he alone can say that he is not bound. None but the infant himself can avoid his contracts..... *Ibid.*
9. It is a well-established principle, that when a contract is reduced to writing, all anterior and contemporaneous stipulations and representations are merged in the written instrument. This rule, however, does not exclude fraudulent misrepresentations made for the purpose of inducing a party to enter into contract sought to be enforced.
Gooch vs. Conner, 391
10. Where a party promises to pay a certain sum "in consideration of their (the promisees) assuming debts of W. W." to the amount of said sum, the assumption of the debts is not a condition precedent to the payment of the money. The promise is absolute and unconditional..... *Overton vs. Curd & Russell*, 420
11. Where no time is fixed for the performance of that which is the consideration of the promise, the promise will be considered unconditional..... *Ibid.*
12. A. purchased of B. a tract of land, and executed his notes for the purchase money, payable in instalments, the last due 9th of August, 1840; and at the same time B. executed his bond for a conveyance, whenever the purchase money should be fully paid. On the 25th of September, 1842, A. executed a new note to B. in lieu of the note given for the last instalment. On this note suit was brought, and A. contended that the payment of the purchase money and the making of the deed for the land were, by the terms of the bond, to be concurrent acts: *Held*, That whether the payment of the note due on the 9th of August, 1840, and the making of the deed, were, by the contract, to be concurrent acts, was immaterial: the note sued on having been given in consideration of the cancellation of the note due on the 9th August, 1840, and having been executed after that note became due, and long after the execution of the bond for the conveyance of the land, it became payable independent of any covenants contained in that bond..... *Brand vs. Vanderpool*, 509
13. Where there is a special contract in force, a party cannot waive the contract and proceed upon a *quantum meruit*..... *Chambers vs. King & Tunstall*, 517

CONVEYANCES.

1. A. gave to B., his granddaughter, certain slaves, and to C., his grandson, certain other slaves. The instrument of the gift was a deed, providing, that if either the said B. or C. should "*die without heirs*," then the property of the one so dying should absolutely vest in the other. B. died without leaving any children: *Held*, that the gift was an entire disposition of the property of the donor in the slaves, and that the limitation over, being to take effect after such disposition, was void. *Wilson vs. Cockrill*, 1
Quere—Whether the limitation over would have been valid had the same been created by will, or conveyance under the statute of uses..... *Ibid.*
2. See SHERIFF'S SALES, 4, 5 and 6.
3. Under the act of December 23, 1815, (1 Territorial Laws, 422,) directing the mode of taking the acknowledgment or proofs of deeds executed by non-residents, a notary public of another State was not one of the officers therein authorized to take the acknowledgment of a non-resident to a conveyance of lands situated in this State.
Wathen vs. Farr, 324
4. See LIEN, 5.

5. In a deed of conveyance, a part of the land conveyed was described "*as lying west, and adjacent to the tract of land first above mentioned.*" *Held*, to be merely words of description, and not amounting to a covenant that the land did lie west, and adjacent to the land first mentioned..... *Ferguson vs. Dent*, 667

6. See *TENDER*, 3.

CORPORATE SEAL.

An instrument of writing, executed on behalf of a corporation, and to which the seal of the corporation is affixed, must be declared on as a bond or sealed instrument, although, in the body of the instrument, it is stated to be a *note*, having the corporate seal affixed thereto..... *Benoist & Hackney vs. Inhabitants of Carondelet*, 250

CORPORATIONS.

The inhabitants of a corporate town are competent witnesses for the corporation, in a suit brought by the town, and in which the rights of the town are in controversy.

Brada vs. Inhabitants of Carondelet, 644

COSTS.

1. Plaintiff brought an action of assumpsit in the Circuit Court against defendant, and recovered twenty-five dollars: *Held*, that as the suit was properly cognizable before a justice of the peace, the plaintiff could not recover costs, but the costs should have been adjudged against him..... *Day vs. Hornbuckle & Wife*, 37
2. Where administrators, who are also heirs at law, sue in the latter character for property belonging to the estate of the deceased, when they might have sued in their representative character, they will not be allowed the costs of suit out of the estate.
Hughes vs. Hughes, 38
3. In actions of trespass, if any damages be found for the plaintiff, he is entitled to recover costs..... *Bragg vs. Brooks*, 40
4. The 1st section of the act of February 20, 1835, concerning "Costs," (R. S. 1835, p. 127,) embraces those cases only in which the name of the real plaintiff is not upon the record, as when an official bond is given to the State, and suit is instituted in the name of the State to the use of the party suing. Where the proceeding is against a public officer, or against such officer and his securities, by motion in the name of the real plaintiff, the act does not require that security for costs should be given before the proceeding is instituted. The act does extend to cases commenced before a justice of the peace..... *McCurdy vs. Brown & Gibson*, 549

COUNTY COURTS.

1. The records of the county courts are the evidence of their official acts; and all orders of court not entered on record are extra-judicial and void.. *Medlin vs. Platte County*, 235

COURTS.

1. The county courts of the State of Tennessee are courts of general jurisdiction, and the record of the probate of a will from such a court is a record and judicial proceeding within the meaning of the constitution of the United States, and the act of Congress of 26th May, 1790, for the authentication of records, &c. *Bright et al. vs. White*, 423
2. In an action of debt on a judgment recovered in the "County Court" of Louisa county, in the State of Virginia, the plaintiff offered in evidence the record of a judgment rendered at a "court of quarterly session" for said county: *Held*,
That there was no variance, it appearing from the record that the court of "quarterly session" was the "County Court," the judgment being recorded by the County Court at its quarterly session.
Chandler vs. Garr, 428

COVENANTS.

1. In covenant, the declaration should state a covenant of the defendant to the plaintiff.
Perkins vs. Reeds, administrator of Nash, 33
2. In an action on a covenant to warrant and defend unto the plaintiff a certain tract of land sold to him by defendant, the former offered in evidence a transcript of the proceedings in an action of forcible entry and detainer, brought before a justice of the peace by plaintiff against one F., in which F. got a judgment for one-half of the land. Defendant was no party to this suit, and had no notice of the proceeding.

Held: That the record of the judgment before the justice was evidence of an eviction, but could not establish that such eviction was by title paramount.

Fields vs. Hunter, 128

3. Covenant will not lie on a penal bond conditioned to be defeated by the performance of collateral conditions: therefore, it will not lie on a sheriff's bond.

The State, to use, &c., vs. Woodward, 353

4. A. sold to B. a certain tract of land, and bound himself in the penal sum of six hundred dollars, to give B. possession of the land by a certain day. B., in the same instrument, bound himself to pay A., by that day, a certain sum, the consideration money. *Held*: That had there been no penalty annexed to the covenant of A., his covenant to give possession would have been dependent on the covenant of B. to pay the consideration money; but the penalty annexed to the covenant of A. made the covenant independent..... *Freeland vs. Mitchell, administrator of Thomas*, 487
5. Covenants, in relation to their dependence or independence, are to be construed according to the intention and meaning of the parties, as gathered from the instrument. A covenant with a penalty annexed will always be considered as dependent..... *Ibid.*
6. A. purchased of B. a tract of land, and executed his notes for the purchase money, payable in instalments, the last due 9th of August, 1840; and at the same time B. executed his bond for a conveyance, whenever the purchase money should be fully paid. On the 25th of September, 1842, A. executed a new note to B. in lieu of the note given for the last instalment. On this note suit was brought, and A. contended that the payment of the purchase money and the making of the deed for the land were, by the terms of the bond, to be concurrent acts: *Held*, That whether the payment of the note due on the 9th of August, 1840, and the making of the deed, were, by the contract, to be concurrent acts, was immaterial: the note sued on having been given in consideration of the cancellation of the note due on the 9th August, 1840, and having been executed after that note became due, and long after the execution of the bond for the conveyance of the land, it became payable independent of any covenants contained in that bond..... *Brand vs. Vanderpool*, 597
7. Where two covenants are independent of, and have no reference to, each other, the averment of the performance of one of them in a suit upon the other will be considered immaterial, and a plea traversing the performance will be bad on general demurrer..... *Ibid.*
8. Where a vendor covenants to convey to the vendee, "by a good and sufficient warranty deed," the land sold, it becomes the duty of the former to tender the deed to the latter. The vendee is not bound to demand the conveyance before his right of action accrues on the covenant..... *Barret vs. Browning*, 689

CRIMES AND PUNISHMENTS.

1. The act of February 6, 1836, (Session Acts of 1836-37, p. 60,) amendatory to the act of March 20th, 1835, concerning crimes and punishments, providing for the punishment of certain felonies, when committed by slaves, was not designed to alter the nature of the offence, but merely to substitute another mode of punishment, and the offence being still a felony, the name of a prosecutor is not required to be endorsed on the indictment..... *Lucy vs. The State*, 134
2. A bank-note is personal property, and the subject of larceny, within the meaning of the thirty-second section of the third article of the act of 1835, concerning crimes and punishments. (Rev. Stat., 1835, p. 178.) — See *The State vs. Newell*, 1 Mo. Rep., second edit., p. 171..... *McDonald vs. The State*, 283
3. A disclosure, by a grand juror, of the names of witnesses who testified before the jury, and the fact that they did testify, and the subject-matter about which they testified, is not an offence within the provisions of the seventeenth section of the fourth article of the act concerning practice and proceedings in criminal cases.
The State vs. Brewer, 373
4. The selling of spirituous liquors after nine o'clock on Sunday is indictable, whether the party selling has a license to vend spirituous liquors or not. The privilege conferred by the license is subject to the restraints imposed by the general law in force

when the license is granted. Such a license confers no right to violate the provisions of the Criminal Code.—See R. S. 1835, title, "Crimes and Punishments," art. 8, sec. 31, p. 209; *Ibid.*, "Inns and Taverns," p. 316..... *Lambert vs. The State*, 492

5. If a person assume to act as a physician, however ignorant of medical science, and prescribe with an honest intention of curing the patient, but through ignorance of the quality of the medicine prescribed, or of the nature of the disease, or both, the patient die in consequence of the treatment, contrary to the expectation of the person prescribing, he is not guilty of murder or manslaughter. But if the party prescribing have so much knowledge of the fatal tendency of the prescription, that it may be reasonably presumed that he administered the medicine from an obstinate, wilful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter at least, though he might not have intended any bodily harm to the patient..... *Rice vs. The State*, 561
6. An offence punishable otherwise than by death or imprisonment in the penitentiary, is not a felony, within the meaning of the statute of 1835, concerning crimes and punishments.—(Rev. Stat., p. 216, sec. 36.) *Nathan (a slave) vs. The State*, 631

CRIMINAL PRACTICE.

1. Although it is the province of the judge, and not that of the jury, to determine whether the dying declarations of the deceased are admissible, in cases where the death of the deceased is the subject of the charge, yet where the whole subject was left to the jury, under the direction of the court, and it was apparent that the accused had sustained no injury from the manner in which the declarations were introduced, the court refused to reverse the judgment on account of such irregularity.
McLean vs. The State, 153
2. In capital cases, and, indeed, in all cases of felony, the jury, after they are sworn, should not be permitted to separate until they rendered their verdict, and if permitted to separate, the judgment will be reversed..... *Ibid.*
3. The only reason for setting aside a verdict where a separation of the jury has taken place, is, that the jury have been tampered with, or might have been tampered with; but where the record precludes any such supposition, the verdict will not be set aside merely because one of the jury, without the permission of the court, absented himself from the other jurors for a short time..... *Whitney vs. The State*, 165
4. Where there is any evidence having a tendency to establish a certain fact, the jury are to judge of its strength and sufficiency, and it is erroneous to instruct the jury, under such circumstances, that there is no evidence to establish such fact..... *Ibid.*
5. The defendant was indicted for horse-stealing, and his declarations were given in evidence against him. The defendant offered to prove, "that when engaged in horse-trading he was in the habit of drinking, and when in liquor was in the habit of telling inconsistent and false tales as to the manner in which he obtained his horses." *Held*, That such evidence of defendant's vicious habits of drunkenness and falsehood was properly excluded..... *Ibid.*
6. Evidence that the offence proved before the jury (and of which the jury found the defendant guilty) is another and different offence from that which was proved before the grand jury who found the bill, is inadmissible..... *Spratt vs. The State*, 247
7. Where a person committed for any offence is brought before any court or magistrate under the habeas corpus act, he cannot be discharged for any "informality, insufficiency or irregularity of the commitment;" therefore, where a person was charged in the commitment with the commission of manslaughter, and it appeared that the offence was only an assault with intent to kill, the magistrate before whom the prisoner was brought properly described the offence in the recognizance as an assault, &c.—Rev. Stat. 1835, title, "Habeas Corpus," art. 3, sec. 13, p. 303.
Snowden vs. The State, 483
8. Where a *scire facias* is issued on a forfeited recognizance in a criminal case, it is not necessary that the *scire facias* should contain an averment that an indictment had been found against the principal in the recognizance..... *Ibid.*
9. On a *scire facias* the court will give judgment according to law, and not according to

the prayer of the plaintiff. Therefore, when the writ of *scire facias* required the defendants to show cause why the same should not be levied of "their respective bodies, lands and chattels," instead of "their respective goods and chattels, lands and tenements," the error was held not to vitiate the writ, but considered as a mere clerical blunder *Ibid.*

10. Upon the trial of an indictment for murder in the first degree, a verdict that the jury find the prisoner "*guilty in manner and form as he stands charged in the indictment*," is insufficient, the 1st section of the 7th article of the act concerning "Practice and Proceedings in Criminal Cases" making it the duty of the jury, "if they convict the defendant, to specify in their verdict of what degree of the offence they find the defendant guilty."—R. S. 1835, p. 493 *McGee vs. The State*, 495
11. Whatever may be taken advantage of in arrest of judgment may be corrected by writ of error *Ibid.*
12. The defendant was indicted under the 31st section of the 8th article of the act concerning "Crimes and Punishments," (R. S. 1835, p. 209,) for selling "fermented liquors" after nine o'clock on Sunday morning, and was found guilty. The evidence was that defendant sold *ale*, and some evidence was given to show that *ale* was a fermented liquor: *Held*, That whether *ale* was a fermented liquor or not was a question for the jury, and it not appearing that the court misdirected the jury in relation to that or any other question arising on the trial, the judgment was affirmed. *Bach vs. The State*, 497
13. See WITNESSES, 4.
14. The act authorizing a change of venue in criminal cases, is imperative whenever a case is made out in conformity with its requisitions, and it is not left to the discretion of the court, when the requirements of the act are complied with, to grant or refuse the application as a mere matter of discretion *Freleigh vs. The State*, 606
15. The court may, in its discretion, permit witnesses to be recalled and examined, at any time before the jury retire, in criminal as well as civil cases, in order to supply testimony that has been omitted by inadvertence or mistake *Ibid.*

DAMAGES.

1. In an action of trespass, where the declaration contains counts under the statute and at common law, and entire damages are assessed, the damages will not be trebled, it not appearing from the verdict that the damages were assessed the statutory counts only.

Quere.—Should not a declaration in trespass, under the statute, in order to bring the offence within its terms, aver that the defendant had no interest or right in the property taken away, and that it was on land not his own?—See Rev. Stat., 1835, title, "Trespases," p. 612. *Lowe & Forsythe vs. Harrison*, 350

DEBT.

1. The action of debt, for rent in arrear, though founded on a deed, is an exception to the general rule, that whenever an action is founded on a deed, the deed must be declared on *Garvey vs. Dobyns*, 213

DEBTOR AND CREDITOR.

1. See PRINCIPAL AND SURETY, 1.

DECLARATIONS.

1. See EVIDENCE, 5.

DEEDS.

1. See CONVEYANCES, 1, 3.

DEED OF ASSIGNMENT.

1. The validity of a deed of assignment alleged to be fraudulent, may be tried in a court of law upon an issue made between an attaching creditor and the assignee, summoned as garnishee under the provisions of the law relating to attachments.

Lee et al. vs. Tabor et al., 322

2. See ASSIGNMENT, 1, 2.

DEDICATION.

It is well settled that the owner of land may, without deed or writing, dedicate it to public uses. No particular form or ceremony is necessary in the dedication. The assent of the owner of the land, and the fact of its being used for the purposes intended by the appropriator, are sufficient to constitute a dedication. But where such owner is interested in proving such dedication; and seeks to gain some advantage thereby, he will be held to strict proof of a dedication, and evidence that would have established a dedication as against him will not be sufficient *Rector vs. Hartt*, 448

DEMURRER.

1. Where a demurrer is filed to the whole declaration, and some of the counts are bad and others good, the demurrer should be sustained as to the bad counts, and overruled as to the others.—(See Rev. Stat., 1835, title, "Practice at Law," art. 3, sec. 14, 16., p. 458, 459.) *Buford vs. Byrd*, 244
2. See PRACTICE, 38.

DESCRIPTION.

1. See SHERIFF'S SALES, 4, 5.

DETINUE.

Where an action of detinue is brought by a tenant in common of a chattel, without joining his co-tenants, the non-joinder may be plead in abatement, or may be taken advantage of on the trial, although the form of the action is *ex delicto*.

Smoot vs. Wathen, administrator, 522

DILIGENCE.

The holder of a check should use due diligence in presenting the same for payment, and if the drawer sustains any loss or injury from the want of such presentment, he will be discharged *St. Johns vs. Homans*, 382

ESTRAYS.

A person claiming an estray as taken up must show that all the pre-requisites of the law have been complied with. He must show the performance of all those acts which the law requires to be performed, in order to vest the property of the estray in him.

Crook & Thurston vs. Peebly, 344

EVIDENCE.

1. Where a person who is a material witness for the defendant, in an action on tort, has been joined with such defendant, and there is no evidence, or slight evidence against him, the jury may find a separate verdict in his favor; in which case, the cause being at an end, with respect to him, he may be admitted as a witness for the other defendant *Brown vs. Burrus*, 26
2. The manner of examining a witness is entirely within the discretion of the court before whom the witness is produced. Material testimony ought not to be rejected because offered after the evidence is closed on both sides, unless it has been kept back by trick, and the opposite party would be deceived or injuriously affected by it. So, after a witness has been examined and cross-examined, the court may, at its discretion, permit either party to examine him again, even as to new matter, at any time during the trial *Ibid.*
3. If a witness is sworn, and gives some evidence, however formal or unimportant, he may be cross-examined in relation to all matters involved in the issue *Ibid.*
4. Where a testator omits in his will to make a disposition of a part of his property, or where it is ambiguous upon the face of the will what disposition he intended to make of such part, parol evidence is inadmissible to show that the testator intended to give such part of his estate to a particular heir *Davis vs. Davis*, 56
5. A party cannot give evidence, in his own favor, his own declarations, when not made in the presence of the other party *McLean vs. Rutherford*, 109
6. A party cannot give parol evidence of the existence and contents of a judgment rendered by a justice of the peace, without first proving its loss or destruction. Secondary evidence of a record is inadmissible, unless its loss or destruction be first proved. *Bogart vs. Green & Rogers*, 115

7. Where a judgment is given in evidence, it is equally conclusive in its effect, as if it were specially pleaded in bar *Offutt vs. John*, 120
8. See PRACTICE, §.
9. In an action on a covenant to warrant and defend unto the plaintiff a certain tract of land sold to him by defendant, the former offered in evidence a transcript of the proceedings in an action of forcible entry and detainer, brought before a justice of the peace by plaintiff against one F., in which F. got a judgment for one-half of the land. Defendant was no party to this suit, and had no notice of the proceeding.
Held, That the record of the judgment before the justice was evidence of an eviction, but could not establish that such eviction was by title paramount.
Fields vs. Hunter, 128
10. The fact, that a subscribing witness to a writing was a person of bad character, may influence the jury in determining whether the writing was the act of the person purporting to have executed it, but cannot prevent the writing from being admitted in evidence..... *Lawless vs. Guelbreth*, 139
11. The transcript of the docket of a justice of peace is evidence only of such matters as he is by law required to place there. Therefore, where the justice stated on his docket that the agent of the plaintiff released one of the defendants from the note sued on, it was held no evidence of a release..... *Brown vs. Pearson*, 159
12. Parol evidence to the effect that there was an understanding between the obligor, in the bond sued on, and the obligee, at the time of the execution of the bond, that the latter would not hold the former responsible on the bond, is inadmissible. Where a contract is reduced to writing, the presumption of law is, that the writing contains the whole contract, and a party will not be permitted to contradict his written agreement by parol evidence..... *Woodward et al. vs. McGaugh et al.*, 161
13. A party possessing a community of interest in the subject-matter, is, nevertheless, a competent witness, unless the record of the judgment would be evidence for or against him..... *Cason, administrator, vs. White*, 216
14. A., as principal, and J. and M., as securities, executed their note to Platte county, for money borrowed. It appeared, upon the trial, that the name of J., one of the securities, had been erased from the note, and M., the other security, offered to prove that the County Court of that county, while in session, verbally ordered the name of J. to be erased, without the consent of M. *Held*: That this evidence was inadmissible; that the records of the County Court are the evidence of their official acts; and that all orders not entered on record are extra-judicial and void.
Medlin vs. Platte County, 235
15. Proof that the notary made inquiry of several of his acquaintances in different parts of the city of St. Louis, as to the place of business or residence of the maker of a bill, without being able to ascertain either, was held to dispense with proof of notice.
Shepard vs. Citizens' Insurance Co., 272
16. In a suit by a mortgagee of personal property, against a purchaser of the mortgaged property, under execution against the mortgagor subsequent to the mortgage, the mortgagor is a competent witness for the mortgagee..... *King vs. Bailey*, 332
17. In an action for a malicious prosecution, in causing the plaintiff to be arrested as a vagrant, the warrant upon which the arrest was made did not sufficiently describe the offence. Yet, as it appeared that the warrant was intended to arrest the plaintiff, for the offence charged by the defendant, it was properly admitted in evidence.
Williams vs. Vanmeter, 339
18. In an action for a malicious prosecution, the defendant may show that, in good faith, and upon a full representation of all the facts, he was advised by counsel that a prosecution was warranted, but he will not be permitted to show that he was advised by any other than counsel, as by the justice who issued the warrant..... *Ibid.*
19. The assignment of a bond or note must be in writing, to enable the assignee to maintain an action thereon in his own name, and the writing itself should show whether the assignment had been made: parol evidence is inadmissible to prove that fact.
Miller, to use, &c., vs. Paulsell & Newman, 355

20. It is a well-established principle, that when a contract is reduced to writing, all anterior and contemporaneous stipulations and representations are merged in the written instrument. This rule, however, does not exclude fraudulent misrepresentations made for the purpose of inducing a party to enter into contract sought to be enforced.
Gooch vs. Conner, 391
21. Books offered in evidence as the "printed statute books" of a sister State, must purport "to be printed under the authority of such" State. (See Rev. Stat. 1835, title, "Evidence," sec. 2, p. 250.) Therefore, the book entitled, "The Statute Laws of the State of Tennessee, of a public and general nature, revised and digested by John Haywood and Robert L. Cobbs, by order of the General Assembly," and the book entitled, "A compilation of the Statutes of Tennessee, of a general and permanent nature, from the commencement of the Government to the present time, with references to Judicial Decisions in notes; to which is appended a new collection of Forms: by K. L. Caruthers and A. O. Nicholson, Nashville, Tennessee," are not admissible in evidence as the "statute books" of the State of Tennessee, neither "purporting to be printed under the authority" of that State. *Bright et al. vs. White*, 421
22. See VARIANCE, 3.
23. Boone county brought suit against the treasurer of that county and his securities in his official bond, for a default. On the trial, the county offered to introduce as a witness another security of the treasurer in a former bond, who being interrogated on his *voir dire*, stated that he had no interest in the event of the suit, but believed that a recovery against the defendants would prevent a suit against him: *Held*, That his interest was of that remote and contingent character which affected only his credibility, and did not render him incompetent. The record in this suit could not be evidence for or against the witness in another action.
Todd et al. vs. Boone County, 431
24. In an action of slander, for charging plaintiff with having been guilty of fornication, evidence that there was "a common report in circulation," concerning the guilt of the plaintiff, is inadmissible. Neither can the defendant prove that a third person told him of the report before the time he was charged with speaking the words.
Moberly vs. Preston & Wife, 462
25. Where several are sued on a joint and several contract, one of the defendants will not be allowed to appear and testify on behalf of the plaintiff, against the consent of the other defendants, for he is decidedly interested in the event of the suit, in diminishing his own liability. *Levy vs. Hawley*, 510
26. The 16th and 17th sections of the fifth article of the act relating to justices' courts, (Rev. Stat., 1835, p. 361,) allowing a party, in certain cases, before a justice of the peace, to summon the adverse party as a witness, and in the event of his not appearing, to testify himself, do not authorize a plaintiff to summon a defendant to testify against his co-defendants. It was not the intention of the statute to suffer one defendant to prejudice by his own oath, or by his disobedience to a subpoena, the right of a co-defendant. *Ibid.*
27. A transcript of proceedings had before a justice of the peace who is out of office, certified by the justice in possession of the docket, is evidence of such matters as are properly on the docket. But where the party against whom the transcript is offered objects to its admission on account of its containing irrelevant matter, he should point out the same, and ask the court to exclude the exceptionable matter. It will not do to object in general terms to the rendering of the transcript.—See act of February 1, 1839, concerning "Evidence," session acts of 1838-39, p. 43.
Palmer vs. Hunter, 512
28. Upon a trial, for the purpose of determining the validity of a will, where several of the devisees are made defendants, the declarations of one of the defendants as to the state of mind of the devisor, at the time of making the will, may be given in evidence against all the defendants. *Armstrong vs. Farrar*, 627
29. Where the parties to a suit have a joint interest in the matter in controversy, whether as plaintiffs or defendants, an admission made by one is, in general, evidence against all. *Ibid.*

30. The inhabitants of a corporate town are competent witnesses for the corporation, in a suit brought by the town, and in which the rights of the town are in controversy.
Brada vs. Inhabitants of Carondelet, 644
31. If the plaintiff denies the truth of the answer of a garnishee, it is incumbent upon him to prove that the answer is untrue. The law presumes the answer to be true, until the contrary is made to appear by the plaintiff.
Davis, garnishee of Fleming, vs. Knapp & Shea, 657
32. A note payable in property, is admissible in evidence under the money counts.
St. Louis Floating Dock Co. vs. Soulard, 665
33. Hearsay evidence is incompetent to establish any specific fact, which, in its nature, is susceptible of being proved by witnesses who can speak from their own knowledge.
Chouteau vs. Searcy, 733
34. It is for the court alone to determine whether a witness is competent, or the evidence admissible. It is therefore erroneous, after permitting the testimony of a witness to go to the jury, to instruct the jury to disregard the testimony, if they should find that the witness was interested *Ibid.*

EXECUTION.

1. See LIEN, 1.
2. See SHERIFF, 1.
3. The bare possession of a chattel by a mortgagor, with the consent or permission of the mortgagee, and determinable at his will, is not the subject of sale under execution *King vs. Bailey*, 332
4. See JUDGMENTS, 7, 8.
5. In a proceeding before a sheriff or constable, to try the right of property between the defendant in the execution and the claimant, the verdict of the jury is a full protection to the officer, as well against the plaintiff in the execution as the claimant. The plaintiff cannot compel the officer to sell the property levied upon by tendering a sufficient bond of indemnity.— See Rev. Stat., 1835, title, "Executions," sec. 24, p. 257; also, "Justices' Courts," art. 7, sec. 14-16, p. 367 *Fisher vs. Gordon*, 386
6. An officer is bound to use reasonable diligence in searching for property of the defendant in the execution, but the mere fact that the defendant had property will not render the officer liable, if he used reasonable diligence to discover property, and could find none *Ibid.*
7. The 13th section of the act of February 21, 1825, concerning executions, providing, "that in all cases where execution shall be levied upon any real estate, the sheriff shall divide the property, if susceptible of division, and sell only so much thereof as will be sufficient to satisfy the execution," &c., is directory. A violation of its injunction will not make a sale void, although it may be good cause for setting it aside. Every application to vacate or set aside a sale so made must be governed by its own circumstances: no general rule can be laid down upon the subject. *Rector vs. Hartt*, 448
8. See GARNISHMENT.

FEES.

1. The third section of the act of February 27, 1843, concerning the register of lands, providing, that "the fee allowed the register of lands, upon the payment of taxes upon land or town lots, and all other fees, at the State treasury, shall be paid into the State treasury by the person paying taxes," is not inconsistent with the 32d section of the act of Feb. 27, 1843, to "provide for the sale of lands for the taxes," allowing the register certain fees for every tract of land or town lot which he shall certify out for sale, &c. The former act refers to those fees only which were allowed the register by the act of February 3, 1841, entitled, "An act to establish a register's office;" therefore, the register is entitled to the fees allowed him in said 32d section, and the auditor may draw his warrant in favor of the register for the fees allowed him under this section, as the services are rendered.— See Session Acts of 1840-41, p. 119; also, Session Acts of 1842-43, p. 105, 137 *Heard vs. Baber*, 142
2. Where a witness residing in another State is here compelled to enter into recognizance

for his appearance as a witness before the courts of this State, he will be allowed mileage from his place of residence..... *Hutchins vs. The State*, 288

FORCIBLE ENTRY AND DETAINER.

1. Where a person in possession of premises sells the same and removes from the house, and delivers the keys of the house to his vendee, with the intention of giving him possession, such acts amount to a delivery of possession, and will enable the vendee to maintain an action of forcible entry and detainer against an intruder.
Hoffstetter vs. Blattner, 276
2. The 27th section of the act of January 28, 1839, concerning "forcible entry and detainer," (session acts of 1838-39, p. 48,) makes it the duty of the appellant himself to file the transcript of the justice's proceedings, on or before the return day of the appeal, and his failure to do so gives the appellee the right to produce the transcript, and have the judgment of the justice affirmed. And where the judgment is thus affirmed, a writ of restitution may be issued from the Circuit Court.— See same act, sec. 34, 41..... *Keim vs. Daugherty*, 498
3. A. brought an action of "forcible entry and detainer" against B., in the township of C. On the trial, the jury being unable to agree, were discharged, and the cause, on motion of A., was removed to another township in the same county: *Held*, That there was no error in the removal of the cause, as the jurisdiction of the justice was co-extensive with the county.— See Rev. Stat., 1835, title, "Forcible Entry and Detainer," sec. 5, p. 278, and "Justices' Courts," art. 1, sec. 6, p. 348..... *Ibid.*
4. Where judgment by default has been rendered against the defendant in an action of forcible entry and detainer, he will not be entitled to an appeal, although he first moves to set aside the judgment by default, and such motion is overruled.— See act of January 28, 1839, concerning "forcible entry and detainer," sec. 11, session acts of 1838-39, p. 47..... *Ser vs. Bobst*, 506
5. But where, in such, the appeal has been allowed by the justice, the cause will not be dismissed from the docket of the Circuit Court if the judgment against the appellant was improperly given, as where he has not been served with process as the law requires. In such case it is not the duty of the Circuit Court to try the cause *de novo*, without regarding any error or imperfection in the proceedings before the justice... *Ibid.*
6. Where process may be served by leaving a copy of the summons "at the usual place of abode" of the party, with some white member of his family "above the age of fifteen years," a return that the copy was left "at the dwelling-house" of the party, "with his wife," and the same read to her, is insufficient. The law will not presume that "the dwelling-house" of the party was his "usual place of abode," nor that his wife was "above the age of fifteen years."..... *Ibid.*
7. Where, in an action of forcible entry and detainer, a judgment by default has been improperly entered against the defendant, the proper course to be pursued by the defendant seems to be to apply to the Circuit Court, under the 37th section of the act of January 28, 1839, concerning forcible entry and detainer, to compel the justice to allow the appeal..... *Ibid.*

FRAUD.

1. Where a person *bona fide*, and for a valuable consideration, purchases slaves from one having a power of attorney from the owner to sell the slaves, the latter cannot avoid the sale on the ground that the power of attorney was fraudulently obtained from him..... *Lawless vs. Guelbreth*, 139
2. Possession of personal property by the mortgagor, after the mortgage, is not fraudulent and void *in law*, as against creditors, prior or subsequent.— See S. C., 6 Mo. Rep., 575; *Shepherd vs. Trigg*, 7 Mo. Rep., 161; *Ross vs. Crutsinger*, *Ibid.*, 245.
King vs. Bailey, 332
3. The act of February 11, 1835, entitled, "An act to prevent fraud," (Rev. Stat., 1835, p. 283, 284,) does not require that conveyances of goods and chattels, made for a valuable consideration, should be recorded. The act avoids conveyances of goods and chattels, for a consideration not deemed valuable in law, unless possession actu-

ally and *bona fide* accompany the conveyance or gift, or unless the same is acknowledged and recorded in the like manner as deeds for land..... *Ibid.*

4. The 4th section of the act of February 11, 1835, concerning fraud, (R. S. 1835, p. 283,) rendering void certain conveyances of personal property, "as against creditors and purchasers," &c., embraces only creditors of, or purchasers from, the parties to the conveyance. A purchaser from a person not a party to the conveyance, but having only the possession of the property in right of another, and not deriving title under the conveyance, is not embraced within this section..... *Allison vs. Bowles*, 346
5. The statute of frauds rendering void loans of personal property, after five years' possession, as to all creditors and purchasers of the persons remaining in possession, &c., does not affect the title as between the parties to the loan, as between them the property is still considered a loan. And where the loanee dies in possession the property is not considered as assets, nor can it be recovered as such by the executor or administrator of the loanee.—See act of January 4, 1825, concerning "Fraud," sec. 3 Rev. Stat. of 1815, p. 402; also, act of February 11, 1835, concerning "Fraud," sec. 5 Rev. Stat. of 1835, p. 283..... *Smoot vs. Wathen, administrator*, 522

GAMING.

See WAGER, 1, 2.

GARNISHMENT.

If the plaintiff denies the truth of the answer of a garnishee, it is incumbent upon him to prove that the answer is untrue: the law presumes the answer to be true, until the contrary is made to appear by the plaintiff..... *Davis, garnishee, vs. Knapp & Shea*, 657

HABEAS CORPUS.

Where a person committed for any offence is brought before any court or magistrate under the habeas corpus act, he cannot be discharged for any "informality, insufficiency, or irregularity of the commitment," therefore, where a person was charged in the commitment with the commission of manslaughter, and it appeared that the offence was only an assault with intent to kill, the magistrate before whom the prisoner was brought properly described the offence in the recognizance as an assault, &c.—Rev. Stat. 1835, title, "Habeas Corpus," art. 3, sec. 13, p. 303.

Snowden et al. vs. The State, 483

INDICTMENTS.

1. Where an indictment contained two counts, on the first of which a *nolle prosequi* was entered, and the time of committing the offence was only averred by reference to the first count, it was held, that the defendant might be tried and convicted on the second count, it not being stricken out, or rendered null, as, perhaps, it would have been upon a demurrer sustained..... *Wills vs. The State*, 52
2. If the offence in an indictment under the act of February 16, 1841, entitled, "An act to regulate groceries and dram-shops," be described in the words of the statute, the indictment will be *bad*.—See *contra*, *The State vs. Comfort*, 5 Mo. Rep., 337; *The State vs. Martin*, *Ibid.*, 361; *The State vs. Mitchell*, 6 Mo. Rep., 147.
The State vs. Brown, 210
3. The act of March 18, 1835, entitled, "An act to regulate inns and taverns," is, with the exception of the 33d section, in force, and an indictment for dealing in wines and spirituous liquors should charge that the defendant had no license for that purpose. If the indictment charges, in the words of the statute, that the defendant sold such wines, &c., "without having a dram-shop license continuing in force," the indictment will be *bad*..... *Ibid.*
4. In an indictment for gaming, under the sixteenth section of the eighth article of the act concerning crimes and punishments, (Rev. Stat., 1835, p. 208,) if the offence charged be described in the words of the statute, it is sufficient.—*Spratt vs. The State*, 247
5. An endorsement on an indictment, as follows—"A true bill," signed by the foreman, is a sufficient certifying of the indictment..... *Ibid.*
6. An endorsement on the back of an indictment, "A true bill," signed by the foreman of the grand jury, is a sufficient certificate, within the meaning of the nineteenth section

of the third article of the act of 1835, concerning practice and proceedings in criminal cases. (Rev. Stat., 481.)—See *Spratt vs. The State*, ante, p. 247, 249.

McDonald vs. The State, 283

7. Where the name of the county is written in the margin of the indictment, and in the body of the indictment the county is referred to by name, as, "the county of Washington aforesaid," the venue is well laid..... *Ibid.*
8. In an indictment for stealing bank-notes, it is not necessary to allege that the bank is a chartered institution, authorized by law to issue notes.—See art. 6, sec. 20, act concerning practice and proceedings in criminal cases, Rev. Stat., 1835, p. 491..... *Ibid.*
9. In an indictment for "open, gross lewdness, or lascivious behavior," under the eighth section of the eighth article of the act concerning "crimes and punishments," (Rev. Stat., 1835, p. 206,) it is not sufficient to charge the defendant generally, in the words of the statute, with being guilty of "open, gross lewdness and lascivious behavior," by then and there publicly cohabiting with one F., &c.; but the specific act in which the lewdness or lasciviousness is displayed must be specified, with that degree of certainty that would advise the accused of the specific charge he is called upon to answer..... *Dameron vs. The State*, 494
10. A ticket in a lottery, which entitles the holder to one-fourth of the prize drawn to its numbers, although usually called a quarter of a ticket, is a *lottery ticket*, within the meaning of the act of December 19, 1842, "to abolish lotteries, and to prohibit the sale of lottery tickets in this State," and may be so described in an indictment under this act..... *Freleigh vs. The State*, 606
11. In an indictment, under the act of December 19, 1842, "to abolish lotteries, and to prohibit the sale of lottery tickets in this State," for selling a lottery ticket, contrary to the provisions of said act, it is not necessary to set out the ticket by its tenor or purport: it is sufficient to describe the ticket as a "certain lottery ticket."..... *Ibid.*
12. An indictment will lie, on the above act, for the sale of a *lottery ticket*, although the statute is in the plural, prohibiting the sale of *lottery tickets*..... *Ibid.*
13. An offence punishable otherwise than by death, or imprisonment in the penitentiary, is not a felony, within the meaning of the statute of 1835, concerning crimes and punishments; (Rev. Stat., p. 216, sec. 36;) therefore, in an indictment against a negro, or mulatto, for an attempt to commit a rape on a white female, which offence is punishable by castration, it is not necessary to aver that the act was done *feloniously*, or with a *felonious* intent. (Rev. Stat. 1835, p. 170, sec. 28.)

Nathan (a slave) vs. The State, 631

INFANT.

2. An administrator may set up the infancy of his intestate as a bar to a demand founded on a bond executed by the infant. Although the defence of infancy is a personal privilege, yet the administrator is the representative of his intestate, and stands in his place..... *Parsons vs. Hill*, 135
2. Plaintiffs, who were the owners of a ferry-boat, brought suit against defendant, under the act concerning boats and vessels, for an injury to their reversionary interest in the boat. Some of the plaintiffs were minors, and sued by guardian. It appeared, that the adult plaintiffs had leased the boat to one Ward, but it did not appear that the lease was executed by the infant plaintiffs, or their guardian: *Held*, That the infants, by joining in the suit, had affirmed the contract of the other part-owners. *Ward vs. Steamboat Little Red*, 358
3. An infant can become a party to a contract, made without authority from him, by his subsequent adoption of it, as well as by his previous express consent. If an infant affirms a contract, he alone can say that he is not bound. None but the infant himself can avoid his contracts..... *Ibid.*

INJUNCTIONS.

1. After the dissolution of an injunction, staying proceedings at law, and the awarding of damages, the court, as a court of chancery, has nothing to do with the case; the parties should be left to proceed in their suit at law..... *Powers et al. vs. Waters*, 299.
2. When an injunction is asked for to stay proceedings at law before judgment, it will

only be granted upon terms, so as to leave the party at liberty to proceed to trial and judgment, unless a discovery is sought for to aid a defence at law, or the answer is, in some other way, necessary on the trial *Ibid.*

INSTRUCTIONS.

1. An instruction not predicated on the evidence in the cause is erroneous: so is an instruction which, in effect, tells the jury that they must believe the evidence.—See *Bryant vs. Wear and Hickman*, 4 Mo. Rep., 106 *Vaulx vs. Campbell*, 224
2. The judgment of the court below will not be reversed on account of erroneous instructions given, when it is apparent that the party complaining has sustained no injury thereby.—See *Newman vs. Lawless*, 6 Mo. Rep., 301; *Finney et al. vs. Allin*, 7 Mo. Rep., 419 *Ibid.*
3. An instruction, "that the plaintiff has shown a *prima facie* right to the possession" of the property in controversy is erroneous, as amounting to an instruction that the jury must believe the facts on which the instruction is founded *Garesche vs. Boyce*, 228
4. Where there is any evidence tending to the proof of a fact, its sufficiency to establish that fact must be determined by the jury; therefore, in such a case, it is erroneous in the court to instruct the jury that the evidence is not sufficient to prove the controverted fact *Glasgow & Harrison vs. Copeland*, 268
5. Although an instruction may assert a correct legal principle, yet, if the same principle has been announced to the jury in other instructions, the court is not bound to give such instruction *Williams vs. Vanmeter*, 339
6. When instructions are given, although taken separately, each might be exceptionable; yet if, taken together as a whole, they contain a correct exposition of the law of the case, the judgment will not be reversed *Ibid.*
7. A party who complains of erroneous instruction must take his exceptions at the time the instructions are given. Exceptions to the opinion of the court must be taken in the progress of the trial, and not after the trial *Randolph vs. Alsey*, 656
8. See PRACTICE, 49.
9. An instruction which assumes the existence of any fact in issue, is erroneous. *Thompson vs. Botts*, 710
10. It is erroneous to instruct the jury to find for a party upon the supposition that they find another fact to be true, when there is no evidence of the existence of such supposed fact *Chouteau vs. Searcy*, 733

INSURANCE.

1. Insurers are responsible for a loss occasioned by a risk insured against, notwithstanding such loss may be attributable to the negligence or misconduct—not amounting to barratry of the assured, or his agents. *St. Louis Insurance Co. vs. Glasgow, Shaw & Larkin*, 713
2. Where a steamboat was insured, among other risks, against fire, and afterwards was put on the floating dock for the purpose of being repaired, and while on the dock was burned, and such burning was occasioned by the carelessness and negligence of the workmen having the boat in charge, the insurers were held liable for the loss. *Ibid.*
3. Where the assurer stipulates in the policy that the boat shall be completely provided with "master, officers and crew," it is no breach of such stipulation that the boat was placed temporarily in the charge of workmen for the purpose of repairs *Ibid.*
4. Where the assured agrees that the boat shall be completely provided with "master, officers and crew," it is necessary to aver, in an action on the policy, that the boat was so provided *Ibid.*

INTEREST.

1. Where there has been no contract for the payment of interest, an action cannot be sustained for the interest after the payment of the principal; but otherwise, where there has been an express agreement to pay the interest as well as the principal. *Stone vs. Bennett*, 41
2. S. agreed to pay to B. one thousand dollars at the expiration of five years from the date of the agreement, and one hundred and twenty dollars interest, per annum, there-

on, during the time, with the privilege of discharging the whole at any time; and further stipulated, that if he should, "at any time before the falling due of said bond, pay any part of it, he shall be exonerated from interest on that part of the one thousand dollars paid," and interest on the remainder should be calculated in the ratio of one hundred and twenty to one thousand. *Held*: That the true construction of this agreement was, that upon the payment of the principal, or any portion thereof, S. would be exonerated from the payment of accruing interest on the principal, or part thereof, paid, but not from the payment of interest that had accrued up to the time of such payment *Ibid*.

JOINT TENANTS.

Joint tenants of a chattel must join in an action for its recovery or its value.

Smoot vs. Wathen, administrator, 522

JUDGMENTS.

1. See JUSTICES' COURTS, 5, 7.

2. See VARIANCE, 1, 3.

3. See EVIDENCE, 6.

4. Where a judgment is given in evidence, it is equally conclusive in its effect, as if it were specially pleaded in bar *Offutt vs. John, 120*

5. A judgment which is voidable only, cannot be questioned in a collateral proceeding. It will stand good until reversed on appeal or writ of error.

Perryman et al. vs. The State, to use, &c., 208

6. If a judgment is void, advantage may be taken of it in any collateral proceeding; but if the court has jurisdiction over the subject-matter, and the party defendant has notice of the proceedings against him, he is bound thereby, however irregular or erroneous the proceedings, and the judgment is binding and conclusive on all parties and privies thereto, in any collateral proceeding, unless it has been vacated for irregularity or reversed for error; and rights and titles acquired by virtue of an execution issued on such judgment will be protected *McNair vs. Biddle, 257*

7. It is well settled, that the courts of law will protect the rights of assignees of a chose in action against all persons having notice of such assignment, express or implied. Therefore, where a judgment debtor, with notice of the assignment of the judgment to a third person, pays the amount thereof to the judgment creditor, it will be no discharge of the judgment *Laughlin vs. Fairbanks, 367*

8. Where a judgment had been assigned, and the debtors, with notice of such assignment, paid the amount to the judgment creditor, and procured from him a receipt for the same, and thereupon the judgment creditor made an endorsement on the execution, directing the sheriff to return the same satisfied; it was held, that such endorsement might be vacated on motion, and a new execution issued for the benefit of the assignees of the judgment: but before such order could be made, all the judgment debtors were entitled to notice of such motion *Ibid.*

9. A judgment obtained after a mortgage is executed, but before it is recorded, will prevail over the mortgage *Hill vs. Paul, 479*

JURIES AND JURORS.

1. The Circuit Court may permit jurors to take with them, when they retire to consider of their verdict, such papers, given in evidence, as may be useful to them in making up their verdict *Cornelius vs. Grant, 59*

2. See CRIMINAL PRACTICE, 3.

JURISDICTION.

1. Under the 15th section of the act of March 7, 1835, concerning courts, (R. S. 1835, p. 156,) the County Court has exclusive original jurisdiction over all the matters detailed in the first six clauses of that section, concurrent jurisdiction with the Circuit Court in the cases enumerated in the seventh clause, and exclusive original jurisdiction or power to perform the various acts specified in the last five clauses. The decision of this Court, in *Erwin vs. Henry*, (5 Mo. Rep., p. 469,) that the exclusive original jurisdiction of the County Court extended only to the cases enumerated in

- the first clause of said section, and that courts of chancery and the county courts had concurrent jurisdiction in the cases enumerated in the remaining clauses of said section, is therefore overruled..... *Miller vs. Woodward et al.*, 169
2. The general control over executors and administrators, given to the circuit courts by the sixth clause of the eighth article of said act concerning courts, is limited in its application to such cases as are not specifically provided for in other parts of the same act, and the act concerning administration *Ibid.*
3. Plaintiff sued defendant before a justice of the peace, on the following account:
- "For one horse colt, valued at.....\$50
- Damages in loss of said colt.....\$35—\$85."
- The Circuit Court subsequently granted a prohibition, on the ground that the justice had exceeded his jurisdiction, the claim not being founded in contract, and the justice not having jurisdiction in actions in *tort* for the amount claimed. *Held*, That the justice had jurisdiction, and that, therefore, the writ of prohibition was improvidently issued *Morris vs. Lenox and Martin*, 252
4. See *COURTS*, 1.
5. See *JUSTICES' COURTS*, 9, 11.

JUSTICES' COURTS.

1. Where a constable offers in evidence the verdict of a jury summoned "to try the right of property between the defendant in the execution and the claimant," under the 14th, 15th and 16th sections of seventh article of the act relating to justices' courts, (R. S. 1835, p. 367,) it must appear that the jury were sworn by some person empowered to administer oaths. Although the statute declares, that "the constable shall administer an oath to each of the jurors," &c., yet any qualified officer may administer the oath *Brown vs. Burrus*, 26
2. Where the claimant of the property levied upon withdraws his claim before the trial of the right of property, the constable is not warranted in proceeding any further with the trial *Ibid.*
3. An execution issued by a justice of the peace is a lien on all the goods and chattels of the defendant in the execution, within the limits of the township to which the execution is directed, from the time of its delivery to the constable *Ibid.*
4. A justice of the peace cannot grant a new trial after a verdict by a jury.
- Cason vs. Tate et al.*, 45
5. The effect of a judgment, in a justice's court, will be given to the verdict of a jury, as soon as the verdict is entered on the justice's docket: and an appeal must be taken within ten days from the entering of the verdict *Ibid.*
6. See *SET-OFF*, 1.
7. A justice of the peace, in certifying transcripts from his docket, may embrace several judgments in one certificate, and it will not be necessary to certify each judgment separately *Perryman et al. vs. The State, to use, &c.*, 208
8. The seventh section of the fifth article of the act relating to "Justices' Courts," (Rev. Stat., 1835, p. 359,) allowing the obligor of a bond to impeach the consideration thereof, applies only to causes originating before a justice of the peace. In suits on bonds originating in the Circuit Court, a partial, or even total, failure of consideration cannot be pleaded in bar of the action *Buford vs. Byrd*, 240
9. Plaintiff sued defendant before a justice of the peace, on the following account:
- "For one horse colt, valued at.....\$50
- Damages in loss of said colt.....\$35—\$85."
- The Circuit Court subsequently granted a prohibition, on the ground that the justice had exceeded his jurisdiction, the claim not being founded in contract, and the justice not having jurisdiction in actions in *tort* for the amount claimed. *Held*: That the justice had jurisdiction, and that, therefore, the writ of prohibition was improvidently issued *Morris vs. Lenox and Martin*, 252
10. Plaintiff sued defendant before a justice of the peace, charging him, in his account filed, with a liability for twenty-five dollars, on account of an accepted order. It appear-

ed in evidence, that the defendant had sold to plaintiff, in payment of the order, an anvil, vice and three hammers, but afterwards refused to deliver them, alleging that the drawer of the order had failed. *Held*: That the plaintiff could not recover, as his account was not a statement of his cause of action. He should have filed an account for the articles purchased..... *Wathen vs. Farr*, 324

11. A. brought an action of "forcible entry and detainer" against B., in the township of C. On the trial, the jury being unable to agree, were discharged, and the cause, on motion of A., was removed to another township in the same county: *Held*, That there was no error in the removal of the cause, as the jurisdiction of the justice was co-extensive with the county.— See Rev. Stat., 1835, title, "Forcible Entry and Detainer," sec. 5, p. 278, and "Justices' Courts," art. 1, sec. 6, p. 348.

Keim vs. Daugherty, 498

12. The 16th and 17th sections of the fifth article of the act relating to justices' courts, (Rev. Stat., 1835, p. 361,) allowing a party, in certain cases, before a justice of the peace, to summon the adverse party as a witness, and in the event of his not appearing to testify himself, do not authorize a plaintiff to summon a defendant to testify against his co-defendants. It was not the intention of the statute to suffer one defendant to prejudice by his own oath, or by his disobedience to a subpoena, the right of a co-defendant *Levy vs. Hawley*, 510

LANDLORD AND TENANT.

In an action for use and occupation, an eviction of part of the premises may be shown in reduction of the rent; but a mere trespass or illegal ouster does not constitute an eviction 738

LIEN.

1. An execution issued by a justice of the peace is a lien on all the goods and chattels of the defendant in the execution, within the limits of the township to which the execution is directed, from the time of its delivery to the constable *Brown vs. Burrus*, 26

2. Under the second section of the "act for securing liens to mechanics and others," (R. S. 1835, p. 108,) the account of the demand of the party, when filed, becomes a part of the record, and stands in place of a declaration..... *Cornelius vs. Grant*, 59

3. In proceedings under this act to enforce the lien, the defendants cannot give evidence of a special contract by the plaintiffs with other persons, at the same time, and for like work, at a much less price; but the defendants may give evidence of the general and most common price of like work, at the time the contract was entered into, or the work done..... *Ibid.*

4. Under the second section of the above act, the amount of the demand of the plaintiff, filed according to the provisions of this section, is evidence of the lien. The abstract made by the clerk, under the third section, is not primary evidence of the lien, and the omission of the clerk to make this abstract will not effect the lien..... *Ibid.*

5. A. mortgaged the land in controversy to B. on the 10th of June, 1841; the mortgage deed was filed for record on the 25th of September following. On the 5th and 6th of July, 1841, judgments were rendered against A., and the land was sold by the sheriff, under the judgments, on the 18th of October, 1841. The sheriff's deed was dated January 18, 1842, and was acknowledged in court on the 23d March, 1842, and filed for record on the same day. On the day of sale the purchaser was notified of the existence of mortgage: *Held*,

That under the statute concerning "Conveyances," (Rev. Stat. 1835, title, "Conveyances," sec. 31, 32, p. 123,) the lien of the judgment prevailed over that of the mortgage. A judgment obtained after a mortgage was executed, but before it was recorded, will prevail on the mortgage..... *Hill vs. Paul*, 479

LIMITATION.

1. Where the plaintiff's cause of action against an estate does not accrue until the lapse of three years after granting letters of administration, he is not barred by the limitation of three years in the administration act..... *Miller vs. Woodward et al.*, 169

2. The rule of law, that the State is not included with the statute of limitations, does not apply to suits on official bonds, taken in the name of the State, for the use of individuals..... *The State, to use of Menard, vs. Pratte et al.*, 286
3. It is well settled, that five years' possession, which gives title under the statute of limitations, and enables a defendant to maintain his possession, or a plaintiff to sustain his action, must be an adverse possession.—See act of March 16, 1835, concerning "Limitation," art. 2, Rev. Stat. of 1835, p. 393, 4... *Smoot vs. Wathen, administrator*, 522

LOTTERIES.

1. See INDICTMENTS, 10, 11, 12.
2. The act of December 19, 1842, "to abolish lotteries, and to prohibit the sale of lottery tickets in this State, is constitutional. Where the legislature authorize a private individual, or a corporation, to raise a sum of money by lottery, to effect an object of public concern, as a railroad, a bridge, or a canal, the statute by which the authority is created may be, at any time, repealed, without violating any constitutional provision *Freleigh vs. The State*, 606

MALICIOUS PROSECUTION.

1. In an action for a malicious prosecution, in causing the plaintiff to be arrested as a vagrant, the warrant upon which the arrest was made did not sufficiently describe the offence: yet, as it appeared that the warrant was intended to arrest the plaintiff, for the offence charged by the defendant, it was properly admitted in evidence.
Williams vs. Vanmeter, 339
2. In an action for malicious prosecution, the bare acquittal of the plaintiff is not sufficient evidence of the want of probable cause..... *Ibid.*
3. In an action for a malicious prosecution, the defendant may show that, in good faith, and upon a full representation of all the facts, he was advised by counsel that a prosecution was warranted, but he will not be permitted to show that he was advised by any other than counsel, as by the justice who issued the warrant *Ibid.*

MORTGAGES.

1. A. being indebted to B. in the sum of 5,000 dollars, on the 26th January, 1820, executed to him his bond for that sum, payable one year after date, secured by mortgage on certain real estate of A. On the 30th November, 1820, A. executed another bond to B. for the payment of 500 dollars at one year, secured by mortgage on same property. On the 17th April, 1821, A. mortgaged to B. certain other real estate, to secure the payment of the further sum of 3,951 dollars.

B., in 1823, commenced suit against A. on the first-mentioned bond, and in 1824 recovered judgment against him for the amount thereof; and under said judgment all the real estate in the first-mentioned mortgage, and all the real estate in the last-mentioned mortgage, situate in St. Louis county, were sold by the sheriff, and, with the exception of one lot, purchased by B., for the sum of 2,700 dollars.

After this sale, in 1824, B. filed his petition against A. in St. Louis Circuit Court, to foreclose the equity of redemption to all the real estate included in the last mortgage, situate in St. Louis county; upon which judgment was rendered, that unless A. pay the mortgage debt on or before the 3d November, 1825, &c., that the mortgage premises be sold, &c. No steps were ever taken to carry into effect this judgment. The heirs of A. filed their bill to redeem the real estate included in the above mortgages, &c. *Held:*

1. That an equity of redemption could be sold on an execution at law, previous to the revision of the Statute Laws in 1825, as well as subsequent to that revision.—See 1 Territorial Laws, 1807, ch. 38, sec. 42, 45, p. 120.
2. That where a mortgagee institutes suit at law to recover the debt secured by the mortgage, and obtains judgment for the amount of the debt, he will not be allowed to sell the equity of redemption, under execution on such judgment. Therefore, the sale of the mortgaged property by B., under the judgment obtained on the bond for 5,000 dollars, in 1824, was void, and the heirs of A. had a right to redeem the real estate in the first mortgage.

3. That the proceedings on the petition of B. for the foreclosure of the real estate included in the last mortgage, amounted to an admission by B. that A. had a right to redeem the lands included in that mortgage.
McNair et al. vs. O'Fallon et al., 188
2. A mortgagee may become the purchaser of the equity of redemption directly from the mortgagor, or may purchase the property under a decree of foreclosure and sale.
The mortgagee has never been considered within the rule which forbids trustees and those having a fiduciary, or confidential, character from purchasing estates with whose disposition they have been entrusted *McNair vs. Biddle*, 257
3. In a suit by a mortgagee of personal property, against a purchaser of the mortgaged property under execution against the mortgagor subsequent to the mortgage, the mortgagor is a competent witness for the mortgagee *King vs. Bailey*, 332
4. The bare possession of a chattel by a mortgagor, with the consent or permission of the mortgagee, and determinable at his will, is not the subject of sale under execution .. *Ibid.*
5. A mortgagee of personal property is, after the day of redemption is passed, regarded in law as the absolute owner, and may dispose of the property in any manner he pleases *Robinson vs. Campbell*, 365, 615
6. A judgment obtained after a mortgage is executed, but before it is recorded, will prevail over the mortgage *Hill vs. Paul*, 479
7. B., in 1819, mortgaged the lot in question to M., who obtained a judgment of foreclosure, in 1824, upon which no execution was issued. A few days after the judgment, M. signed a writing, to the effect, that he would convey to B. a certain lot whenever B. redeemed the mortgage. In 1827, M. purchased the equity of redemption of B., in the mortgaged lot, at sheriff's sale, under a judgment against B., in favor of the Bank of Missouri.
B., in 1837, filed his bill to redeem the lot, upon the ground that the sale, in 1827, was illegal and void, and that the writing signed by M., in 1824, gave B. an indefinite time for redemption.
Held: That the sale of the lot, in 1827, was legal, and that M., at such sale, purchased the equity of redemption of B. The purchase of M., at this sale, was entirely independent of the judgment of foreclosure and the subsequent agreement, and could not be affected thereby *Benton vs. O'Fallon, executor*, 650
8. The interest of B., in the lot mortgaged, continued to be an equity of redemption, after the judgment of foreclosure, until the sale of the equity, in 1827, to M. *Ibid.*

NEW MADRID CERTIFICATE.

1. *Ejectment*.—By virtue of the act of Congress of 17th February, 1815, entitled, "An act for the relief of the Inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes," the recorder of land titles issued a certificate on the 30th November following, to B. L., (under whom plaintiff claimed,) or his legal representatives, authorizing him to locate 640 acres of land.

On the 7th July, 1817, T. H., by virtue of this certificate, located the land in controversy. The survey of this location was made in April, 1818. On the 13th June, 1827, a patent issued for this land to B. L., or his legal representatives.

The title of the defendant was founded on a confirmation made by the Supreme Court of the United States in 1830, to the representatives of James Mackay, the claim in question being included within the boundaries of said confirmation. (*Mackay vs. The United States*, 10 Peters, p. 340.) A patent for the land confirmed, including the land in controversy, issued to the legal representatives of said Mackay, dated 31st March, 1841. From the record of this suit, it appeared, that the action was instituted on the 25th May, 1829, under the act of Congress of 26th May, 1824, and the acts supplementary thereto, for the purpose of "enabling the claimants to lands within the limits of the State of Missouri, &c., to institute proceedings to try the validity of their claims." *Held*:

1. That, although a confirmation under said act of Congress of 26th May, 1824, vests in the confirmee all the proprietary interest of the United States in the

- land, and is in terms and in effect an acknowledgment that the title of the claimant was valid under the laws and usages of the former government, and protected by the treaty of cession, yet it does not follow that these confirmations recognize such claims as perfect and complete titles, or that they give to the claim of the confirmer, as against other claimants, any more validity than it would have had under the former government.
2. That the effect of a confirmation under the acts of Congress of 26th May, 1824, and 24th May, 1828, is only a relinquishment of title on the part of the United States, and does not affect the right or title of adverse claimants of the same land. Therefore, the confirmation and patent to the representatives of said Mackay amounted merely to a relinquishment of the title of the United States to the land in controversy.
3. That the land in controversy having been disposed of by the United States, within the meaning of the 11th section of said act of May 26, 1824, the defendant's confirmation in 1830 could not prevail over the plaintiff's patent issued in 1827.
4. That, without undertaking to decide whether a New Madrid certificate, issued under the said act of 17th February, 1815, could be located on unsurveyed lands of the United States, yet, when a patent has issued, the courts will presume that the steps preliminary to a valid disposition of the land have been taken, unless it can be made to appear, that when the location was made, the land was expressly reserved from sale. *Barry vs. Gamble*, 88

NEW TRIAL.

1. See *TRESPASS*, 1.
2. See *JUSTICES' COURTS*, 4.
3. Where the Circuit Court improperly grants a new trial, and the party complaining wishes to avail himself of the error, he should tender his bill of exceptions, and abandon the case at that point, otherwise he cannot assign for error the granting of the new trial. *Davis vs. Davis*, 56
4. A new trial will not be granted on the ground of surprise in the testimony of a witness of the opposite party in relation to a particular fact, when the party must have been aware that the witness would have been called for the purpose of proving that fact, as where a notary public is called by the plaintiff to prove due notice of the dishonor of a bill of exchange. *Shepard vs. Citizens' Insurance Co.*, 272
5. A new trial will not be granted upon the ground that the attorney of the party was absent at the trial, being mistaken as to the time of the meeting of the court. *Steigers vs. Darby*, 679

NONSUIT.

1. A judgment of nonsuit cannot be entered against a plaintiff without his consent. *St. Louis Floating Dock Insurance Co. vs. J. G. Souldard*, 665
- Wells vs. Gaty et al.*, 681

NOTARY PUBLIC.

See *CONVEYANCES*, 3.

NOTICE.

1. Although it may not appear, from the proceedings in a cause, that process has been served on a party, yet if he appear by attorney and file a plea, &c., he will be considered as having personal notice. The object of a summons is to procure the attendance of a party, and so that is effected, it matters not whether the summons is served or not. *McNair vs. Biddle*, 257
2. See *JUDGMENTS*, 7, 8.

OFFICE AND OFFICER.

1. An action cannot be maintained against a judge or justice of the peace, acting judicially and within the sphere of his jurisdiction, for any error he may commit, however erroneous his decision, or corrupt or malicious his motives. *Stone vs. Graves*, 148
2. This principle does not extend to ministerial acts performed by a judicial officer. For

- error or misconduct in such acts, he is responsible in like manner, and to the same extent, as all ministerial officers..... *Ibid.*
3. G. brought an action on the case against L., a justice of the peace, for maliciously, &c., issuing his warrant against G., and causing him to be arrested, &c., as a vagrant. *Held*: That the action would not lie; that a justice of the peace, acting within the sphere of his office, is not liable to an action for an error of judgment, EVEN IF HE ACT CORRUPTLY, but must be indicted..... *Lenox vs. Grant*, 254
 4. The omission of the clerk of the County Court to affix the seal of that court to the certificate of the election of a justice of the peace, will not affect the validity of such election, or the rights of the justice as such magistrate.—See Rev. Stat., 1835, title, "Justices of the Peace," sec. 11, p. 345..... *Carpenter vs. The State*, 291
 5. Where a sheriff, after having given bond as collector, and after having been charged with the amount of the tax-book by him received, resigns his office, he is not thereby relieved from the obligation imposed by his bond as collector, but is bound to pay into the State treasury the amount of the tax-book charged against him, deducting the delinquent list, if any there be..... *Howard vs. The State*, 361
 6. When the tax-books are delivered to the collector, and the amount thereof is charged against him on the books of the auditor of public accounts, the collector becomes responsible for the amount of the tax-books, and his resignation of his office will not affect that responsibility, whether he proceeds to collect the taxes or not..... *Ibid.*
 7. In a proceeding before a sheriff or constable, to try the right of property between the defendant in the execution and the claimant, the verdict of the jury is a full protection to the officer, as well against the plaintiff in the execution as the claimant. The plaintiff cannot compel the officer to sell the property levied upon by tendering a sufficient bond of indemnity.—See Rev. Stat., 1835, title, "Executions," sec. 24, p. 257; also, "Justices' Courts," art. 7, sec. 14-16, p. 367..... *Fisher vs. Gordon*, 386
 8. An officer is bound to use reasonable diligence in searching for property of the defendant in the execution, but the mere fact that the defendant had property will not render the officer liable, if he used reasonable diligence to discover property, and could find none..... *Ibid.*
 9. See TAXES, 3.
 10. The first section of the act of February 20, 1835, concerning "Costs," (R. S. 1835, p. 127,) embraces those cases only in which the name of the real plaintiff is not upon the record, as when an official bond is given to the State, and suit is instituted in the name of the State to the use of the party suing. Where the proceeding is against a public officer, or against such officer and his securities, by motion in the name of the real plaintiff, the act does not require that security for costs should be given before the proceeding is instituted. The act does extend to cases commenced before a justice of the peace..... *McCurdy vs. Brown & Gibson*, 549
 11. The fifth section of the act of January 4, 1841, concerning the liability of county officers on their official bonds, (Session acts of 1840-41, p. 31, 32,) providing that "persons injured by the neglect or misfeasance of any such officer may proceed against such principal, (or) any one or more of his securities, jointly or severally, in any proceeding authorized by law against such officer for official neglect or injury," does not render liable the securities of a constable to the penalty imposed upon such officers for failing to return an execution, by the eighth section of the act of March 17, 1835, concerning constables. (R. S. 1835, p. 117.) Proceedings under this section are confined to the constable; the sureties are not embraced within its provisions... *Ibid.*
 12. The fifth section of the act of 1841 does not extend the liability of securities; it only gives a more summary remedy against them in cases in which they were liable at the time of the passage of the act..... *Ibid.*
 13. Where a person gives a bond, for the faithful discharge of the duties of an office, it is an admission of his appointment or title to the office, so far as to make him liable for official misconduct or neglect of duty..... *Barada vs. The Inhabitants of Carondelet*, 644

OFFICIAL BONDS.

1. The rule of law, that the State is not included within the statute of limitations, does not

apply to suits on official bonds, taken in the name of the State, for the use of individuals *The State, to use of Menard, vs. Pratte*, 286

2. See **TAXES**, 3.

3. The fifth section of the act of January 4, 1841, concerning the liability of county officers on their official bonds, (Session acts of 1840-41, p. 31, 32,) does not extend the liability of securities; it only gives a more summary remedy against them in cases in which they were liable at the time of the passage of the act.

McCurdy vs. Brown and Gibson, 549

PARTITION.

1. A court of equity has no power to decree a partition of personal chattels between joint-tenants, or tenants in common. *Gudgell et al. vs. Mead et al.*, 53

PARTNERSHIP.

1. An action may be maintained for breach of a promise to admit the plaintiff as a partner in a particular undertaking, where the plaintiff and defendant agreed to become partners in such undertaking, and to share the profits and losses. *Byrd vs. Fox*, 574
2. Where, in a settlement between partners, there is but one item, and that adjusted by an express promise to pay the amount, assumpsit may be maintained thereupon, by one partner against the other: and so, even, where the item is unadjusted. *Ibid.*

PENAL BONDS.

1. Covenant will not lie on a penal bond conditioned to be defended by the performance of collateral conditions. Therefore, it will not lie on a sheriff's bond.
The State, to use, &c., vs. Woodward, 353
2. M., one of the defendants, contracted with the county of Platte to cover the courthouse of said county with tin, the work to be done with good tin, and in the best manner, &c., for which M. was to receive \$758. M., with the other defendants as his securities, entered into bond to the county for the faithful performance of the work in the sum of \$1,570, "not as a penalty, but as liquidated damages." The court held that the sum mentioned in the bond, viz., \$1,570, was to be considered as a penalty, and not as liquidated damages. *Moore & Hunt vs. Platte Co.*, 467

PLEADING.

I. PARTIES TO THE ACTION.

II. DECLARATION.

III. PLEAS IN ABATEMENT.

IV. PLEAS IN BAR.

I. PARTIES TO THE ACTION.

Joint-tenants, or tenants in common of a chattel, must join in an action for the recovery of the chattel, or its value *Smoot & Wathen, administrators*, 522

II. DECLARATION.

1. In covenant, the declaration should state a covenant of the defendant to the plaintiff.
Perkins vs. Reeds, 53
2. Alternative allegations are not allowed in pleading; therefore, a declaration charging that the defendant lost or destroyed, &c., is bad. *Stone vs. Graves*, 148
3. The action of debt, for rent in arrear, though founded on a deed, is an exception to the general rule, that wherever an action is founded on a deed, the deed must be declared on. *Garvey vs. Dobyns*, 213
4. An instrument of writing, executed on behalf of a corporation, and to which the seal of the corporation is affixed, must be declared on as a bond or sealed instrument, although, in the body of the instrument, it is stated to be a note, having the corporate seal affixed thereto. *Benoist & Hackney vs. The Inhabitants of Carondelet*, 250
5. In declaring on a written instrument, the plaintiff must set out the legal effect of the instrument. It will not be sufficient for the plaintiff to state that the defendant made his certain writing obligatory, &c., and then set out a copy of the instrument, without stating that the same was made to the plaintiff. *Moore & Hunt vs. Platte Co.*, 467
6. A party cannot, in the same declaration, declare on two contracts, one made by all the defendants, and the other by one only of the defendants. *Ibid.*

7. A declaration in slander, charging the plaintiff with swearing to a lie, as a witness in a proceeding before a justice of the peace, in which it is not stated that the justice had jurisdiction or power to administer the oath, or that the testimony was given upon a material matter, although had on demurrer, is good after verdict.
Palmer vs. Hunter, 512
8. A count in slander stating the actionable words to be, that plaintiff "swore to a lie," with an averment that defendant meant thereby, and was so understood, to charge the plaintiff with the crime of perjury, but without any colloquium, is bad. *Ibid.*
9. See EVIDENCE, 32.

III. PLEAS IN ABATEMENT.

Where an action of detinue is brought by a tenant in common of a chattel, without joining his co-tenants, the non-joinder may be plead in abatement, or may be taken advantage of on the trial, although the form of the action is *ex delicto*:

Smoot vs. Wathen, administrator, 523

IV. PLEAS IN BAR.

1. Under the plea of *non est factum*, the defendant will not be allowed to prove "that the bond sued on was a stake put up by the defendant against a similar bond executed by the plaintiff, as a wager upon the election of president of the United States," such defence being irrelevant to the issue. *Stapleton vs. Benson*, 13
2. Under this plea, it may be shown, that the defendant was a lunatic or a married woman, or that the bond was delivered as an escrow, or that it was altered: but where the defendant relies on matter extraneous, such as infancy or duress, usury or gaming, the facts must be specially pleaded. *Ibid.*
3. In an action on an administration bond, it is a good plea that the cause of action did not accrue within ten years *The State, to use of Menard, vs. Pratte et al.*, 286
4. Petition in debt against A., B., and C., on a note assigned to plaintiff by one W.—The defendants pleaded jointly *nil debit*. A. and B. pleaded, also, by way of set-off, that W., the assignee of plaintiff, was, before and at the commencement of the suit, indebted to said A. by note, in a certain sum, and that said W. was also indebted to said B. in a certain sum, to be paid in notes and accounts. *Held*, that the plea was good, because—
 1. That whether at common law defendants in actions *ex contractu* could plead separately or not, the act of February 13, 1839, regulating practice at law, permitting plaintiffs at will to join as many defendants in actions *ex contractu* as they please, certainly gives to defendants the right to plead separately.
 2. That it was not necessary to aver, in the plea of set-off, that the debt mentioned was due at the time of the assignment of the note.
 3. That it is a general rule, that where *indebitatus assumpsit* will lie on a simple contract, the debt due by such contract may be plead as a set-off; therefore the notes and accounts mentioned in the plea were subjects of set-off.
 4. That one of two defendants *ex contractu* may set-off a demand due him by the plaintiff; therefore A. and B. were properly permitted to set-off demands due them separately from the assignee of the plaintiff.
5. A plea of justification in slander, that defendant, being asked by one B. of and concerning the words spoken and published, answered and declared that he had heard and been told the same by one S., is bad. It should have been averred that the defendant, at the time of speaking the words, gave the name of the author.—See *Church vs. Bridgman and Wife*, 6 Mo. Rep, 190. *Moberly vs. Preston and Wife*, 462
6. In a plea of justification in slander, that the words are communicated to defendant by a third person, and that he gave the name of his author at the time of speaking the words, the defendant should give a cause of action against such third person, by showing that he spoke the words falsely and maliciously, and that defendant believed what he heard, and repeated the words on a justifiable occasion. *Ibid.*
7. Where two covenants are disposed of, and have no reference to each other, the aver-

ment of the performance of one of them in a suit upon the other will be considered immaterial, and a plea traversing the performance will be bad on general demurrer.

Brand vs. Vanderpool, 509

8. The eighth section of the act of February 27, 1843, "to simplify proceedings at law," requiring all special pleas in actions on contract to be verified by affidavit, applies to all special pleas filed after the passage of that act, although the suit may have been commenced before the passage of the act. *Barret vs. Browning*, 689

POSSESSION.

1. The statute of frauds rendering void loans of personal property, after five years possession, as to all creditors and purchasers of the persons remaining in possession, &c., does not affect the title as between the parties to the loan, as between them the property is still considered a loan. And where the loanee dies in possession the property is not considered as assets, nor can it be recovered as such by the executor or administrator of the loanee.—See act of January 4, 1825, concerning "Fraud," sec. 3 Rev. Stat. of 1825, p. 402; also, act of February 11, 1835, concerning "Fraud," sec. 5 Rev. Stat. of 1835, p. 283. *Smoot vs. Wathen*, 522
2. It is well settled, that the five years possession, which gives title under the statute of limitations, and enables a defendant to maintain his possession, or a plaintiff to sustain his action, must be an adverse possession.—See act of March 16, 1835, concerning "Limitation," art. 2 Rev. Stat. of 1835, p. 393, 4.
2. Where a person in possession of premises sells the same and removes from the house, and delivers the keys of the house to his vendee, with the intention of giving him possession, such acts will amount to a delivery of possession, and will enable the vendee to maintain an action of forcible entry and detainer against an intruder.
Hoffstetter vs. Blattner, 276
4. See EXECUTION, 3.
5. A person cannot have the actual possession of lands not occupied by him, unless he has the right of property in the land. *Packwood vs. Thorp*, 636

POWER OF ATTORNEY.

1. Where a person *bona fide*, and for a valuable consideration, purchases slaves from one having a power of attorney from the owner to sell the slaves, the latter cannot avoid the sale on the ground that the power of attorney was fraudulently obtained from him. *Lawless vs. Guelberth*, 139

PRACTICE.

1. If several are sued in trespass, and some are acquitted, and others are found guilty, the latter may move for a new trial without being joined in such motion by the former; and the verdict may be set aside as to those found guilty, without affecting the validity of the finding as to the others. *Brown vs. Burrus*, 26
2. Where a person who is a material witness for the defendant, in an action on tort, has been joined with such defendant, and there is no evidence, or slight evidence against him, the jury may find a separate verdict in his favor; in which case, the cause being at an end with respect to him, he may be admitted as a witness for the other defendant. *Ibid.*
3. The manner of examining a witness is entirely within the discretion of the court before whom the witness is produced. Material testimony ought not to be rejected because offered after the evidence is closed on both sides, unless it has been kept back by trick, and the opposite party would be deceived or injuriously affected by it. So, after a witness has been examined and cross-examined, the court may, at its discretion, permit either party to examine him again, even as to new matter, at any time during the trial. *Ibid.*
4. If a witness is sworn, and gives some evidence, however formal or unimportant, he may be cross-examined in relation to all matters involved in the issue. *Ibid.*
5. Where the Circuit Court improperly grants a new trial, and the party complaining wishes to avail himself of the error, he should tender his bill of exceptions, and abandon the case at that point, otherwise he cannot assign for error the granting of the new trial. *Davis vs. Davis*, 56

6. A party will not be allowed to urge in the Supreme Court a point that was not made in the Circuit Court..... *Cornelius vs. Grant*, 59
7. The Circuit Court may permit jurors to take with them, when they retire to consider of their verdict, such papers, given in evidence, as may be useful to them in making up their verdict..... *Ibid.*
8. Where a declaration is founded upon an instrument of writing charged to have been executed by the other party, and the execution thereof is not denied by plea *verified by affidavit*, it may be read in evidence without proof of its execution.—R. S. 1835, title, "Practice at Law," art. 4, sec. 18, p. 463..... *Fields vs. Hunter*, 128
9. Where an objection was made to the introduction of evidence, the bill of exceptions should state the specific grounds upon which the objection was made; for, unless the party points out specific objections in the Circuit Court, and the bill of exceptions shows that those objections were, the case may be decided on one point by the Circuit Court, and reversed on another by the Supreme Court.—R. S. 1835, title, "Practice in the Supreme Court," sec. 31, p. 522..... *Ibid.*
10. A party cannot avail himself of error in the court below, in the giving or refusing of instructions, or the admission of improper evidence, unless he takes his exceptions at the proper time, and in the proper manner..... *Robinson et al. vs. Shepard*, 136
11. Where the answer of a garnishee is not denied in a proper manner, the garnishee should move to dismiss the proceedings against him, and not demur to the denial.
Tuttle vs. Gordon, 152
12. In a suit against two or more on a joint note, the plaintiff may enter a *nolle prosequi* as to one without discharging the others.—See R. S. 1835, title, "Practice at Law," art. 3, sec. 18, p. 459; and act of February 13, 1839, concerning Practice, sec. 1, Session acts of 1838-39, p. 99..... *Brown vs. Pearson*, 159
13. An instruction not predicated on the evidence in the cause is erroneous: so is an instruction which, in effect, tells the jury that they must believe the evidence.—See *Bryant vs. Wear and Hickman*, 4 Mo. Rep., 106..... *Vaulx vs. Campbell*, 224
14. A party must not only object, but must tender his exceptions to the opinion of the court overruling his objections.—See *Shelton vs. Ford and Whitehill*, 7 Mo. Rep., 209..... *Ibid.*
15. The judgment of the court below will not be reversed on account of erroneous instructions given, when it is apparent that the party complaining has sustained no injury thereby.—See *Newman vs. Lawless*, 6 Mo. Rep., 301; *Finney et al. vs. Allen*, 7 Mo. Rep., 419..... *Ibid.*
16. An instruction, "that the plaintiff has shown a *prima facie* right to the possession" of the property in controversy is erroneous, as amounting to an instruction that the jury must believe the facts on which the instruction is founded... *Garesche vs. Boyce*, 228
17. The Circuit Court may, in its discretion, permit the plaintiff to withdraw his replications, and demur to the pleas of defendant, even at the term following that at which the replications are filed..... *Buford vs. Byrd*, 240
18. Where a demurrer is filed to the whole declaration, and some of the counts are bad and others good, the demurrer should be sustained as to the bad counts, and overruled as to the others.—(See Rev. Stat., 1835, title, "Practice at Law," art. 3, sec. 14, 16, p. 458, 459.)..... *Marshall vs. Bouldin*, 244
19. Although it may not appear from the proceedings in a cause that process has been served on a party, yet if he appear by attorney and file a plea, &c., he will be considered as having personal notice. The object of a summons is to procure the attendance of a party, and so that is effected, it matters not whether the summons is served or not..... *McNair vs. Biddle*, 257
20. Where there is any evidence tending to the proof of a fact, its sufficiency to establish that fact must be determined by the jury; therefore, in such a case, it is erroneous in the court to instruct the jury that the evidence is not *sufficient* to prove the controverted fact..... *Glasgow et al. vs. Copeland*, 268
21. A new trial will not be granted on the ground of surprise in the testimony of a witness of the opposite party in relation to a particular fact, when the party must have been

- aware that the witness would have been called for the purpose of proving that fact, as where a notary public is called by the plaintiff to prove due notice of the dishonor of a bill of exchange..... *Shepard vs. Citizens' Insurance Co.*, 272
22. The parties to a suit may agree on the facts of the case, and suffer the court to declare the law arising on those facts; but they will not be allowed to agree on facts not in the cause, and thus obtain the opinion of the court on matters wholly disconnected with the suit..... *Blair vs. State Bank of Illinois*, 313
23. Amendments are not allowed as a matter of course, by the statute, but are only permitted at the discretion of the Court, in furtherance of justice. The Supreme Court will not interfere with the exercise of a discretionary power vested in the Circuit Court, unless, perhaps, under peculiar circumstances.
Caldwell, administrator, vs. McKee, 334
24. Although an instruction may assert a correct legal principle, yet, if the same principle has been announced to the jury in other instructions, the court is not bound to give such instruction..... *Williams vs. Vanmeter*, 339
25. When instructions are given, although taken separately, each might be exceptionable; yet if, taken together as a whole, they contain a correct exposition of the law of the case, the judgment will not be reversed..... *Ibid.*
26. Where the burden of proof lies upon one party, it cannot be thrown upon the other party by the form of the pleading..... *The State, to use, &c. vs. Melton et al.*, 417
27. Where questions of fact have been submitted to a jury, and there is any contrariety in the testimony, the verdict will not be disturbed; but where the measure of damages is fixed by law, and the verdict is obviously the result of a mistaken view of the rule of law applicable to the facts in evidence, it will be set aside.
Todd et al. vs. Boone County, 431
28. Where there is conflicting evidence, and no instructions are asked, the verdict will not be disturbed unless there is a great preponderance of evidence on the side of the party against whom the verdict is rendered..... *Wilson et al. vs. Burks*, 446
29. Where suit was commenced in the St. Louis Court of Common Pleas, prior to the passage of the act of January 16, 1843, concerning courts, providing, that "after the issues shall have been made up, the suits shall stand continued until the second term," (Session acts of 1842-43, p. 58,) and, after the passage of that act, the plaintiff amended his declaration by filing additional counts, it was held, that the defendant was entitled to a continuance, although the ninth section of the act of January 21, 1841, establishing the Court of Common Pleas, (Session acts of 1840-41, p. 51,) made such cases triable at the first term, where personal notice had been served on the defendant..... *Tunstall vs. Hamilton*, 500
30. Where the plaintiff amends his declaration in a matter of substance, the defendant will be entitled to a continuance.—See *Risher vs. Thomas*, 1 Mo. Rep., p. 529, 2d edit.; *Densey vs. Harrison & Glasgow*, 4 *Ibid.*, p. 270..... *Ibid.*
31. Where a continuance is refused a party who has used due diligence to procure testimony, and has failed, such refusal will be good ground for reversing the judgment.—See *McLane vs. Harris*, 1 Mo. Rep., p. 501, 2d edit.; *Riggs vs. Fenton*, 3 *Ibid.*, p. 28; *Moore & Porter vs. McCullough*, 6 *Ibid.*, p. 444..... *Ibid.*
32. Plaintiffs sued out a *scire facias* on a recognizance of appeal. At the return term, the Circuit Court permitted the original judgment and recognizance to be amended on motion of the plaintiff. The defendants then plead *nul tiel record*, and issue was joined thereon. Upon the trial of this issue the defendants objected to the reading of the judgment and recognizance, because the amendments were improperly made: Held, That the objection was not taken in time. The defendants should have objected at the time the amendments were made, and saved their objections by a bill of exceptions..... *Snowden et al. vs. Camden*, 502
33. A transcript of proceedings had before a justice of the peace who is out of office, certified by the justice in possession of the docket, is evidence of such matters as are properly on the docket. But where the party against whom the transcript is offered objects to its admission on account of its containing irrelevant matter, he

should point out the same, and ask the court to exclude the exceptionable matter. It will not do to object in general terms to the rendering of the transcript.—See act of February 1, 1839, concerning "Evidence," session acts of 1838-39, p. 43.

Palmer v. Hunter, 512

34. Where the issue joined is such as necessarily requires proof of facts defectively stated or omitted in the declaration, and without which proof it is not to be presumed either that the judge could direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by verdict *Ibid.*
35. Where the plaintiff and defendant reside in different counties, and the suit is brought in the county in which the plaintiff resides, and the summons is served upon the defendant in the county in which he resides, and he appears and pleads to the action, the illegality of the service is waived by such appearance and pleading. The court having jurisdiction over the subject-matter, but not over the person of the defendant, he should, to have availed himself of the illegality of the service, have filed his plea in abatement: by pleading to the merits, he acknowledged that the court had jurisdiction of his person *Hembree vs. Campbell*, 572
36. The judgment of the Circuit Court will not be reversed for giving erroneous instructions, where the evidence is not preserved in a bill of exceptions.
Cawthorn vs. Muldrow, 617
37. It is the right and duty of a jury to weigh the testimony, and give such credit to it as they may think proper. The judgment of the Circuit Court will not be set aside, upon the ground that the testimony did not warrant the verdict, unless a very strong and palpable case is made out against the verdict *Tiffin vs. Forrester*, 642
38. Where the defendant demurs to the plaintiff's declaration, and the demurrer is overruled, and the defendant then pleads to the action, he must be considered as having withdrawn or waived his demurrer. *Brada et al. vs. Inhabitants of Carondelet*, 644
39. A party who complains of erroneous instructions, must take his exceptions at the time the instructions are given. Exceptions to the opinion of the Court must be taken in the progress of the trial, and not after the trial *Randolph vs. Alsey*, 656
40. Where a promissory note is made payable "with the current rate of exchange on Philadelphia, when due," the amount due thereon does not appear upon the face of the note, and the court cannot assess the damages thereon, after judgment by default, but must cause a jury to be empanelled for that purpose.—See Rev. Stat., 1835, title, "Practice at Law," art. 3, sec. 34, 35; *Farwell et al. vs. Kennett et al.*, 7 Mo. Rep., 595.
Guelberth vs. Watson and Hildeburn, 663
41. A judgment of nonsuit cannot be entered against a plaintiff without his consent.
St. Louis Floating Dock Company vs. Sowlard, 665
42. A new trial will not be granted, upon the ground that the attorney of the party was absent at the trial, being mistaken as to the time of the meeting of the Court.
Steigers vs. Darby, 679
43. The Court has no power to compel the plaintiff to submit to a nonsuit; he has a right to have the verdict of a jury upon the issues of fact. *Wells vs. Gaty et al.*, 681
44. A judgment by default will not be set aside after the damages are assessed, on account of the negligence of the defendant's attorney. No distinction is made between the negligence of the party and the negligence of his attorney.
Field & Cathcart vs. Matson, 686
45. Where replications are filed at a subsequent term of the Court, although without any objection, the defendant is entitled to a continuance. *Bunding et al. vs. Blumenthous*, 695
46. Where a cause is submitted to the Court, sitting as a jury, the parties must, in order to avail themselves of error in the Court, separate the matters of law from the matters of fact, and call the attention of the Court expressly to the point or matter to be decided. *Taylor vs. Russell*, 701
47. Where the plaintiff suffered the term at which the pleas were filed to pass without filing replications, and after the lapse of twenty-five days in the succeeding term judgment of *non pros.* was entered against him, the Court properly refused to set

- aside such judgment, no good cause for the failure of the plaintiff to file his replications being shown. *Baskerville vs. Childs*, 703
48. Where a declaration contains a special count on a promissory note, and the common counts, and judgment is rendered for the plaintiff, it is immaterial whether the note sustains the special count or not, as it is admissible under the common counts. *Swearingen & Bredell vs. J. & B. Orne*, 707
49. When it is apparent that a party has sustained no injury from the instruction given, and that judgment has been rendered for the right party, it is immaterial whether the instruction were erroneous or not. *Ibid.*
50. Where a cause is submitted to the Court, sitting as a jury, and no exceptions are taken to the evidence when it is offered, and the Court is not called upon to decide any point of law, the judgment will not be reversed for error in law or fact. *Little et al. vs. Nelson*, 709
51. It is erroneous to instruct the jury to find for a party upon the supposition that they find another fact to be true, when there is no evidence of the existence of such supposed fact. *Choteau vs. Searcy*, 733
52. An erroneous decision of the Court against the party attaining the verdict is not a sufficient ground for a renewal of the judgment, especially where, upon the merits, it would seem that the party was entitled to his judgment. *McFadin vs. Rippey*, 738

PRINCIPAL AND AGENT.

Where one has authority, as agent or attorney, to bind another in a written instrument, and signs the instrument in his own name alone, he binds himself and no other person, although he may have described himself as agent in the body of the writing.

..... *Overton et al. vs. Stevens et al.*, 622

PRINCIPAL AND SURETY.

1. An agreement between the creditor and the principal debtor, for delay, or otherwise changing the nature of the contract, to the prejudice of the surety, in order to discharge the latter, must be an agreement having a sufficient consideration, and binding in law upon the parties: therefore, where the creditor merely, and without any consideration, extended the time for the payment of the debt, and made a statement on the back of the bond, of such extension, the surety was not thereby discharged. *Nicholas, administrator, vs. Douglass et al.* 49
2. That the right of a security to recover from his principal the amount which he has paid in his behalf, is a right which may be established in a court of law; but his right to stand in the place of the creditor as to all securities, funds, liens, and equities which he may have for the same debt, is a right which can only be established in a court of equity. *Miller vs. Woodward & Thornton, administrators*, 169
3. A. sold a tract of land to B., and took his notes, without any security, for the payment of the purchase money, and retaining only the lien on the land given by him, to secure the payment of the notes. Apprehensive that the land sold would be insufficient to pay the purchase money, A. instituted an action on the note for the second instalment, and attached certain personal property of B., of the value of \$1,000, who, in consideration of the release of the property attached, executed a bond, with sureties to A. for \$1,000, as collateral security for a like amount for the note on which the suit was brought. Judgment was then rendered for the amount due on the note.

At a subsequent term of the court, judgment was obtained on the third note. Upon these judgments, executions were issued, and the tract of land levied upon and sold. The judgment creditor applied the proceeds of the sale, first, to the satisfaction of the execution issued on the last judgment, and the remainder was credited on the execution issued on the first judgment, leaving a sum exceeding the amount of the bond due on such execution.

The sureties in the bond, against whom judgment had been obtained at law, filed their bill for an injunction, &c., contending that, as the judgment for the amount of the second instalment was a lien upon the land sold, they had a right to be substituted, in relation to this lien, in the place of A., the judgment creditor, who, having

discharged the land from the lien by the sale under the execution, thereby released the sureties in the bond. *Held:*

1. That the sureties in the bond had no right to be substituted, in relation to the lien on the land, in the place of the judgment creditor; that A., in giving up the lien of his attachment for the bond, became a purchaser of the bond for a valuable consideration; that the doctrine of substitution was not applicable to a case like the present, where a creditor having a security for his debt, but fearing that it will prove insufficient, obtains additional security. To apply the doctrine of substitution to such a case would defeat the obvious intention of the creditor in obtaining such additional security.
2. The term *collateral*, applied to the security of a third person, does not, *ex vi termini*, confer a right in equity to substitution. Its signification is not technical, and as used by the parties to this suit merely meant *additional or supplemental*.
3. The rule in equity is, that if an individual is security for a debt, and the creditor has a lien on property as collateral security for the payment of the debt, and the surety discharges the obligation of his principal, he should be substituted for the creditor, and have satisfaction out of the property collaterally bound for the payment of the debt. The present is a case where a surety is not asking to be substituted for a creditor who has collateral security for his debt, but one security is demanding to be substituted for the creditor, in relation to another security, when the effect will be to deprive the creditor of one of his resources, and thereby cause a partial loss of his debt.

Crump et al. vs. McMurtry, 408

PROHIBITION.

See JURISDICTION, 3.

PUBLIC LANDS.

See BOUNDARIES.

QUO WARRANTO.

1. The third section of the act of February 25, 1843, entitled, "An act to repeal the charters of certain incorporated companies," declares, that "It is hereby made the special duty of the attorney-general of this State to apply to the Supreme Court for a *quo warranto* against" certain insurance companies, &c. The attorney-general made application to the Supreme Court for said writ of *quo warranto*, as therein directed. The application was refused, on the ground, that the writ of *quo warranto* was a writ of right, and issued as a matter of course on demand of the proper officer.

The State vs. St. Louis Perpetual Insurance Co., 330

2. It would seem that the General Assembly confounded the proceedings on a writ of *quo warranto*, with those on an information in the nature of a *quo warranto*, by making it the duty of the attorney-general to apply to this Court for a writ of *quo warranto*..... *Ibid.*

RECOGNIZANCE.

1. Where it appeared from the record, that two forfeitures of a recognizance were entered at different terms of the same court, it was held, that the last entry might be treated as mere surplusage..... *The State vs. Pepper et al.*, 249
2. A *scire facias* issued against *Conrad Carpenter*, and others, his sureties, on a forfeited recognizance. The recognizance was conditioned for the appearance of *Coonrod Carpenter*, and signed *Conrad Carpenter*. Process was not served on *Carpenter*. *Held:* First, that if considered as a misnomer of the Christian name of *Carpenter*, the error was waived by his failing to plead the misnomer in abatement; second, that, by signing the recognizance, he admitted that he was the person therein named *Coonrod Carpenter*.—Rev. Stat., 1835, title, "Practice and Proceedings in Criminal Cases," art. 9, sec. 14, p. 501..... *Carpenter vs. The State*, 291

RECORDS.

1. Secondary evidence of a record is inadmissible, unless the loss or destruction be first proved..... *Bogart vs. Green & Rogers*, 115

2. The county courts of the State of Tennessee are courts of general jurisdiction, and the record of the probate of a will from such a court is a record and judicial proceeding within the meaning of the constitution of the United States, and the act of Congress of 26th May, 1790, for the authentication of records, &c.

Bright et al. vs. White, 421

RENT.

1. The action of debt, for rent in arrear, though founded on a deed, is an exception to the general rule, that wherever an action is founded on a deed, the deed must be declared on...., *Garvey vs. Dobyns*, 213
2. A lessor cannot recover for one month's rent in arrear, accruing under a lease by which the lessee was only bound to pay at the end of every three months..... *Ibid.*

RESCUE.

1. See RETURN, 1.

RETURN, (OFFICER'S).

1. A rescue is not a good return to an execution. The sheriff or constable has the power of summoning the *posse comitatus* to prevent a rescue, and he is responsible if one is effected..... *The State, to use of Boone Co., vs. Lowry et al.*, 48
2. When, in a suit by attachment, the sheriff makes a false return, by which the plaintiff is prevented from obtaining a judgment, he may proceed immediately against the sheriff, without further prosecution of his attachment *Palmer vs. Crane*, 619

REVENUE.

See TAXES.

SCHOOL LANDS.

1. The Court adhere to the decision made in *Maupin vs. Parker*, (3 Mo. Rep., p. 219, 2d edit.,) viz., that the acts of the General Assembly, providing for the sale of the township school lands, are not repugnant to the nature of the grant, and do not conflict with any provision of the constitution of Missouri.
Payne & Riggin vs. St. Louis County, 473
2. The General Assembly having power to provide for the sale of these lands, for the use of schools, a purchaser under the law authorizing the sale of school lands acquires a valid title to the same *Ibid.*
3. The act of February 25, 1835, "to provide for the sale of township school lands, in Saline and other counties," (Rev. Stat., p. 571,) authorizing the county courts, of the counties therein named, to sell the sixteenth sections, where, "on account of extensive prairies, or other local causes," there may not be fifteen free white householders resident in the township, is not inconsistent with the first section of the act of March 19, 1835, concerning "schools and school lands," providing, that "in all congressional townships in this State, in which there are fifteen free white householders, they shall have the right to sell their sixteenth sections," &c. The latter is the general law, the former local, and confined to the counties therein named.
Brown vs. Crawford County, 640

SCIRE FACIAS.

1. Where a *scire facias* is issued on a forfeited recognizance in a criminal case, it is not necessary that the *scire facias* should contain an averment that an indictment had been found against the principal in the recognizance..... *Snowden vs. The State*, 483
2. On a *scire facias* the court will give judgment according to law, and not according to the prayer of the plaintiff. Therefore, where the writ of *scire facias* required the defendants to show cause why the same should not be levied of "their respective bodies, lands and chattels," instead of "their respective goods and chattels, lands and tenements," the error was held not to vitiate the writ, but considered as a mere clerical blunder..... *Ibid.*

SEAL.

1. An instrument of writing will not be considered as sealed merely because a scrawl is affixed to the signature of the party, by way of seal. There should be something in

the body of the instrument showing that the maker intended it as a deed. The words, "This indenture," will not be considered as expressing such intention.

Walker vs. Keile, 301

2. An instrument of writing will not be considered as sealed unless by some expression in the body of the instrument; the maker should show that he intended it to be considered as a specialty. A mere scrawl at the end of the name, with the word "seal" within it, will not make the writing a bond.—See *Cartmill vs. Hopkins*, 2 Mo. Rep., p. 179, 2d edit.; *Boynton vs. Reynolds*, 3 *Ibid.*, p. 57, 2d edit.; *Grimsley vs. Administrator of Riley*, 5 *Ibid.*, p. 281..... *Glasscock vs. Glasscock & Dodd*, 577

SET-OFF.

1. On an appeal from the judgment of a justice of the peace, the defendant will not be allowed to plead a set-off by way of plea *puis darien continuance*, the statute expressly declaring, that "no set-off shall be pleaded in the Circuit Court that was not pleaded before the justice, if the summons was served on the person of the defendant."—See "Justices' Courts," R. S. 1835, art. 8, sec. 16, p. 371 *Chase vs. Chase*, 103
2. In a suit brought by administrators or executors, on a cause of action accruing to them as administrators or executors since the death of their intestate or testator, the defendant cannot set-off a debt due him from such intestate or testator.
Woodward et al. vs. McGaugh et al., 161
3. It is a general rule, that where *indebitatus assumpsit* will lie on a simple contract, the debt due by such contract may be plead as a set-off..... *Austin vs. Feland & Graves*, 309
4. One of two defendants in an action *ex contractu* may set-off a demand due him by the plaintiff..... *Ibid.*

SHERIFF.

1. In action against a sheriff on his official bond, for failing to make proper return of an execution, the judgment on which the execution was issued is not the foundation of the action; therefore, a variance in the date of it will not be material. The official bond is the foundation of the action *The State, to use, &c. vs. Martin*, 102
2. Covenant will not lie on a sheriff's bond..... *The State, to use, &c., vs. Woodward*, 353
3. See OFFICE AND OFFICER, 5-8.

SHERIFF'S RETURN.

1. See RETURN, 1.
2. In an action against a sheriff for failing to make return of an execution, the burden of proof lies upon the sheriff (defendant.) The plaintiff is not bound to prove the allegation in his declaration, that the sheriff did not make return of the execution according to the command thereof.
The State, to use of Sublette and Campbell, vs. Melton, 417
3. The endorsement on the writ by the sheriff, showing the manner in which it was executed, and the filing of the same in the clerk's office, constitute in law the return... *Ibid.*

SHERIFF'S SALES.

1. A sheriff's sale of real estate is within the statute of frauds and perjuries, and unless some note or memorandum of the sale is made, the sale conveys no title.
Evans vs. Ashley, 177
2. A certificate of purchase, under the act of June 28, 1821, entitled, "An act for the relief of debtors and creditors," must be in the name of the sheriff, and such a certificate, signed by the deputy sheriff, in his own name alone, is illegal and void.—See *Evans vs. Wilder*, 5 Mo. Rep., p. 319, S.C.; 7 *Ibid.*, p. 362..... *Ibid.*
3. A certificate of purchase under said act of June 28, 1821, would not, after the repeal of that act, authorize the successor of the sheriff who made the sale to execute a deed for the land to the purchaser, without an order of court for that purpose, made on application of the purchaser, in conformity with the provisions of the act of 1807 concerning practice at law *Ibid.*
4. H. being the owner of 12½ arpens of land adjoining the city of St. Louis, laid the same off into town lots, and sold six of said lots to P., who had formerly been the owner

- of the whole tract. Under a judgment against P., obtained after the sale of the tract, and after its subdivision into town lots, the sheriff levied upon the whole tract, describing it in his advertisement as "12½ arpens of land adjoining St. Louis," &c., and sold the whole tract, and executed a deed to the purchaser for the same, describing it in the same manner as in the advertisement. At the time of this sale, P. had no other interest in the tract than his six lots. *Held*, That the description of the interest of P. in the tract was too vague and uncertain, and the sale and conveyance were therefore void *Ibid.*
5. Where a person owns several lots in a town, laid off on a particular tract of land, the sheriff cannot sell his interest in those lots, by an advertisement offering for sale the whole tract on which the town was laid off. Such a description is altogether too vague and uncertain *Ibid.*
6. The certificate of purchase given by the sheriff, under said act of 28th June, 1821, to the purchaser of land sold under execution, is a sufficient note or memorandum to take the sale out of the operation of the statute of frauds, but does not convey any title to the purchaser, and under such certificate the purchaser cannot maintain or defend in ejectment *Ibid.*
7. The plaintiff was the owner of a quarter of a section of land, about twenty-five acres of which was laid off into forty-eight town lots. The plaintiff was the owner of the entire quarter section, with the exception of one of the lots, ninety by one hundred and fifty feet. The streets and alleys were unopened, designated by no monuments, and covered with brush and timber, with a single highway through the tract. Under an execution issued on a judgment against the plaintiff, the sheriff levied upon the whole quarter section, describing it as the north-west fractional quarter of section 35, township 49, range 17, and sold the whole tract by such description: *Held*, That the description was sufficiently certain; that this case was clearly distinguishable from the case of *Evans vs. Ashley*, (8 Mo. Rep., 177,) where a tract of 12½ arpens was laid off into town lots, and the defendant in the execution was the owner of six of the lots by purchase from the person who laid off the tract into lots, and the sheriff, under such execution, sold the whole tract by its original description. *Rector vs. Hartt*, 448
8. The 13th section of the act of February 21, 1825, concerning Executions, providing, "that in all cases where execution shall be levied upon any real estate, the sheriff shall divide the property, if susceptible of division, and sell only so much thereof as will be sufficient to satisfy the execution," &c., is directory. A violation of its injunction will not make a sale void, although it may be good cause for setting it aside. Every application to vacate or set aside a sale so made must be governed by its own circumstances: no general rule can be laid down on the subject. *Ibid.*

SLANDER.

1. To publish falsely and maliciously of a woman, that she "had a child," with the intention of charging her with having been guilty of fornication, is actionable under the act of January 14, 1835, "declaring certain words actionable."—Rev. Stat. 1835, p. 581 *Moberly vs. Preston and Wife*, 462
2. A plea of justification in slander, that defendant, being asked by one B. of and concerning the words spoken and published, answered and declared that he had heard and been told the same by one S., is bad. It should have been averred that the defendant, at the time of speaking the words, gave the name of the author.—See *Church vs. Bridgman and Wife*, 6 Mo. Rep., 190 *Ibid.*
3. In a plea of justification in slander, that the words are communicated to defendant by a third person, and that he gave the name of his author at the time of speaking the words, the defendant should give a cause of action against such third person by showing that he spoke the words falsely and maliciously, and that defendant believed what he heard, and repeated the words on a justifiable occasion *Ibid.*
4. In an action of slander, for charging plaintiff with having been guilty of fornication, evidence that there was "a common report in circulation," concerning the guilt of

the plaintiff, is inadmissible. Neither can the defendant prove that a third person told him of the report before the time he was charged with speaking the words.... *Ibid.*

5. A declaration in slander, charging the plaintiff with swearing to a lie, as a witness in a proceeding before a justice of the peace, in which it is not stated that the justice had jurisdiction or power to administer the oath, or that the testimony was given upon a material matter, although had on demurrer, is good after verdict.

Palmer vs. Hunter, 512

6. Where the issue joined is such as necessarily requires proof of facts defectively stated or omitted in the declaration, and without which proof it is not to be presumed either that the judge could direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission, is cured by verdict *Ibid.*
7. A count in slander, stating the actionable words to be that plaintiff "*swore to a lie*," with an averment that defendant meant thereby, and was so understood, to charge the plaintiff with the crime of perjury, but without any colloquism, is bad *Ibid.*

SLAVES.

1. See CONVEYANCES, 1.
2. The Court adhere to the decision made in *Ellett vs. Bobb*, (6 Mo. Rep., 324,) that where a person hires a slave for a certain time, and agrees to return the slave at the end of that time, and the slave, in the mean time, runs away, without the fault of the hirer, who has used due diligence to prevent the escape, and retake the slave, but without success, he will only be liable for the hire, and not for the return of the slave..... *Perkins vs. Reeds, administrator of Nash*, 33
3. See CRIMES AND PUNISHMENTS, 1.

SPANISH GRANTS.

1. *Ejectment*.—The plaintiff, "The St. Louis Public Schools," claimed the land in controversy under the act of Congress of 13th June, 1812, entitled, "An act making further provision for settling the claims to lands in the territory of Missouri," and the act supplementary thereto, of May 26th, 1824; the first of which acts confirmed to the inhabitants of the town of St. Louis, &c., their rights, titles and claims to town and village lots, out-lots and common-field lots, in said town, which had been inhabited, cultivated or possessed, prior to the 20th December, 1803, and also "reserved" all town or village lots, out-lots, or common-field lots not rightfully owned or claimed by private individuals, for the support of schools in the respective towns and villages; under the last of which acts, the land in controversy was designated and set apart to the plaintiff, for the use of schools.

Defendant claimed the property under Madame Lachaise, who had exhibited her claims to the first board of commissioners, under a concession which was, by the board, rejected. Afterwards, the recorder of land titles, under the act of 13th June, 1812, reported the claim to Congress for confirmation, and it was confirmed by the act of 29th April, 1816. *Held*:

1. That the second section of the act of 13th June, 1812, which reserves vacant lots for the use of schools, does not pass the legal title to the property so reserved, from the United States.
2. That, under this section, the power to determine in favor of an individual, that he is the rightful claimant of a lot, and that it is not embraced in the reservation, is retained by the Government.
3. That the claim of Madame Lachaise having been confirmed by the act of 29th April, 1816, the fee passed by that act, and the reservation for the use of schools no longer applied to the property.

Hammond vs. St. Louis Public Schools, 65

2. *Ejectment*.—By virtue of the act of Congress of 17th February, 1815, entitled, "An act for the relief of the Inhabitants of the late county of New Madrid, in the Missouri Territory, who suffered by earthquakes," the recorder of land titles issued a certificate on the 30th of November following, to B. L., (under whom plaintiff claimed), or his legal representatives, authorizing him to locate 640 acres of land.

On the 7th July, 1817, T. H. by virtue of this certificate, located the land in controversy. The survey of this location was made in April, 1818. On the 13th June, 1827, a patent issued for this land to B. L., or his legal representatives.

The title of the defendant was founded on a confirmation made by the Supreme Court of the United States in 1830, to the representatives of James Mackay, the claim in question being included within the boundaries of said confirmation. (Mackay vs. The United States, 10 Peters, 340.) A patent for the land confirmed, including the land in controversy, issued to the legal representatives of said Mackay, dated 31st March, 1841. From the record of this suit, it appeared, that the action was instituted on the 25th May, 1829, under the act of Congress of 26th May, 1824, and the acts supplementary thereto, for the purpose of "enabling the claimants to lands within the limits of the State of Missouri, &c., to institute proceedings to try the validity of their claims." *Held:*

1. That, although a confirmation under said act of Congress of 26th May, 1824, vests in the confirmer all the proprietary interest of the United States in the land, and is in terms and in effect an acknowledgment that the title of the claimant was valid under the laws and usages of the former government, and protected by the treaty of cession, yet it does not follow that these confirmations recognize such claims as perfect and complete titles, or that they give to the claim of the confirmer, as against other claimants, any more validity than it would have had under the former government.

2. That the effect of a confirmation under the act of Congress of 26th May, 1824, and 24th May, 1828, is only a relinquishment of title on the part of the United States to the land in controversy.

3. That the land in controversy having been disposed of by the United States, within the meaning of the 11th section of said act of May 26, 1824, the defendant's confirmation in 1830 could not prevail over the plaintiff's patent issued in 1827.

4. That, without undertaking to decide whether a New Madrid certificate, issued under the said act of 17th February, 1815, could be located on unsurveyed lands of the United States, yet, when a patent has issued, the courts will presume that the steps preliminary to a valid disposition of the land have been taken, unless it can be made to appear, that when the location was made the land was expressly reserved from sale. *Barry vs. Gamble*, 88

3. A confirmation under the act of Congress of April 29, 1816, of a claim recommended for confirmation by the recorder of land titles, enures to the benefit of the confirmer, and a certified copy of the opinion of the recorder of land titles, recommending the claim to Congress for confirmation to the extent of a league square, is evidence that the claim is embraced within the act of April 29, 1816, as all the claims recommended by the recorder for confirmation were confirmed by that act.

Roussin vs. Parks, 528

4. See CARONDELET COMMONS.

SPECIFIC PERFORMANCE.

1. B. contracted, in 1825, with the proprietors of the town of Rochepot, for the purchase of a lot in that town, by which he bound himself to erect on said lot a dwelling-house of a certain description within two years, otherwise the lot was to revert to the proprietors. B. neglected to build any house on the lot, and the court being of opinion that he had no sufficient excuse for failing to comply with his contract in this respect, refused to decree a specific performance. Equity cannot relieve against a forfeiture where the party applying for relief is in default.

Broaddus vs. Ward et al., 217

2. A. sold to B. a certain tract of land, and executed his bond for a conveyance. B., at the time of the purchase, provided to pay A. a part of the consideration in a day or two. In the mean time, B. purchased from one H. certain notes held by him on A., who was reputed to be insolvent, and tendered these notes to A. in payment of the purchase money. At the time of the purchase B. purposely avoided saying any-

- thing to A. as to manner of making the payment, and left upon his mind the impression that he was to receive the remaining part of the consideration in money. In a suit in chancery for a specific performance of the contract, brought by B. against A., the court held, that the notes were not a good tender of such remaining part of the purchase money *Durrett vs. Hook*, 374
3. A specific performance of a contract is not a matter of course, but rests entirely in the discretion of the court, upon a view of all the circumstances of the case. If there has been any unfairness or want of good faith, or improper conduct of any kind, on the part of the party asking the aid of the court, a specific performance will not be decreed *Ibid.*

STATUTE OF FRAUDS.

1. See *SHERIFF'S SALES*, 1, 6.
2. A father promised his son, that if he would remove to a piece of land belonging to, and near the residence of the former, he would give the land to his son. The son, at the time of the promise, had a family, and lived in a distant part of the country. He accepted the offer and removed to the land, and his father assigned to him the certificate of entry of the land, in these words: "I, Joseph Halsa, do *sine* the within certificate over to Amos Halsa, which is to empower him to lift the deed in his own name.—April 18, 1835.—JOSEPH HALSA." *Held*:
 1. That the assignment on the certificate was a sufficient note or memorandum to take the transaction out of the operation of the statute of frauds, and passed to the assignee an equitable right to the land.
 2. That it was not necessary the assignment should state the consideration of the transfer, for it is not necessary that the consideration of the agreement should be in writing, in order to take the transaction out of the operation of the statute of frauds. *Halsa vs. Halsa*, 303

SUBSCRIBING WITNESS.

The fact that a subscribing witness to a writing was a person of bad character, may influence the jury in determining whether the writing was the act of the person purporting to have executed it, but cannot prevent the writing from being admitted in evidence. *Lawless vs. Guelbreth*, 139

SUBSTITUTION.

A. sold a tract of land to B., and took his notes, without any security, for the payment of the purchase money, and retaining only the lien on the land given by him, to secure the payment of the notes. Apprehensive that the land sold would be insufficient to pay the purchase money, A. instituted an action on the note for the second instalment, and attached certain personal property of B., of the value of \$1,000, who, in consideration of the release of the property attached, executed a bond, with sureties to A. for \$1,000, as collateral security for a like amount for the note on which the suit was brought. Judgment was then rendered for the amount due on the note.

At a subsequent term of the court, judgment was obtained on the third note. Upon these judgments, executions were issued, and the tract of land levied upon and sold. The judgment creditor applied the proceeds of the sale, first, to the satisfaction of the execution issued on the last judgment, and the remainder was credited on the execution issued on the first judgment, leaving a sum exceeding the amount of the bond due on such execution.

The sureties in the bond, against whom judgment had been obtained at law, filed their bill for an injunction, &c., contending that, as the judgment for the amount of the second instalment was a lien upon the land sold, they had a right to be substituted, in relation to this lien, in the place of A., the judgment creditor, who, having discharged the land from the lien by the sale under the execution, thereby released the sureties in the bond. *Held*:

1. That the sureties in the bond had no right to be substituted, in relation to the lien on the land, in the place of the judgment creditor; that A., in giving up the lien of his attachment for the bond, became a purchaser of the bond for

a valuable consideration; that the doctrine of substitution was not applicable to a case like the present, where a creditor having a security for his debt, but fearing that it will prove insufficient, obtains additional security. To apply the doctrine of substitution to such a case would defeat the obvious intention of the creditor in obtaining such additional security.

2. The term *collateral*, applied to the security of a third person, does not, *ex vi termini*, confer a right in equity to substitution. Its signification is not technical, and, as used by the parties to this suit, merely meant *additional* or *supplemental*.
3. The rule in equity is, that if an individual is security for a debt, and the creditor has a lien on property as collateral security for the payment of the debt, and the surety discharges the obligation of his principal, he should be substituted for the creditor, and have satisfaction out of the property collaterally bound for the payment of the debt. The present is a case where a surety is not asking to be substituted for a creditor who has collateral security for his debt, but one security is demanding to be substituted for the creditor, in relation to another security, when the effect will be to deprive the creditor of one of his resources, and thereby cause a partial loss of his debt. *Crump et al. vs. McMurtry*, 408

SURETIES.

The fifth section of the act of January 4, 1841, concerning the liability of county officers on their official bonds, (Session acts of 1840-'41, p. 31, 32,) does not extend the liability of sureties, but only gives a more summary remedy against them in cases in which they were liable at the time of the passage of the act.

McCurdy vs. Brown & Gibson, 549

TAX SALES.

The lands and lots subject to entry at the office of the register of lands, under the 29th section of the act of February 27, 1843, to provide for the sale of lands for taxes, (Session acts of 1842-'43, p. 142,) are the lands and lots embraced within the first clause of the first section of said act, viz., lands and lots sold or forfeited to the State for taxes, and upon which the taxes have been due and unpaid for six years. Therefore, where the petitioner applied to the register to enter certain lands returned delinquent for the years 1837, '38, and it appeared that the lands were not returned until the 13th of December, 1837, they were not subject to entry under said 29th section, the six years not having elapsed at the time the lands were offered for sale. —See 4th session of the act of February 6, 1837, concerning "Revenue Session Acts of 1836, '37," p. 132 *Campbell vs. Hurd, register*, 519

TAXES.

1. Where a sheriff, after having given bond as collector, and after having been charged with the amount of the tax book by him received, resigns his office, he is not thereby relieved from the obligation imposed by his bond as collector, but is bound to pay into the State treasury the amount of the tax-book charged against him, deducting the delinquent list, if any there be, *Howard et al. vs. The State*, 361
2. When the tax-books are delivered to the collector, and the amount thereof is charged against him on the books of the auditor of public accounts, the collector becomes responsible for the amount of the tax-books, and his resignation of his office will not affect that responsibility, whether he proceeds to collect the taxes or not *Ibid.*
3. Defendant was collector of the revenue for the city of Boonville for the year 1839 and 1840. Bonds with different sets of sureties were given for each of those years. The fiscal year commenced on the 3d of May. The register of the city kept a general account with defendant, and on the 3d of May, 1840, defendant was charged on the books of the register with a default of \$1,437, and this balance was carried over to his account in 1840. The tax-books of 1840, placed in defendant's hands and charged to him, amounted to \$2,631 84. During that year, defendant paid over and was credited with \$3,003. Nothing was ever said as to the application of the payments, to any particular items of indebtedness, but the payments were credited to his general

account. At the end of the fiscal year 1840, there was a general balance struck against defendant, of \$1,070 66. The question was, whether the sureties in the bond of 1840 were liable for this balance, it not appearing from what source the moneys paid in during the fiscal year 1840 were derived.

Held: That where an officer is chargeable with the revenue of a specified year, it will be presumed, in the absence of all proof to the contrary, that payments made during that year are designed to extinguish the liabilities of such year. But in the absence of all proof of intention, payments made in the year 1840, before the collector was charged with the revenue of that year, must be imputed to extinguish the oldest item of indebtedness..... *Draffen vs. City of Boonville*, 395

TENANTS IN COMMON.

1. One tenant in common of land may cast his co-tenant, and hold adversely to him. *Hoffstetter vs. Blattner*, 276
2. Joint tenants, or tenants in common of a chattel, must join in an action for the recovery of the chattel, or its value..... *Smoot vs. Wathen*, 522
3. Where an action of detinue is brought by a tenant in common of a chattel, without joining his co-tenants, the non-joinder may be plead in abatement, or may be taken advantage of on the trial, although the form of the action is *ex delicto*.—*Scott, J.*, dissenting on this point..... *Ibid.*

TENDER.

1. A. executed to B. his negotiable promissory note, by whom it was transferred to the Mutual Insurance Company, and by that company transferred, after due, to C. The time the note became due, A. had on deposit with said company money nearly sufficient to pay the note, and tendered to the company his check on it for the amount on deposit, and a small sum in money, making together the amount of the note. The company was at that time the owner of the note. *Held*, That this was a sufficient tender, and that the note being transferred to C., the plaintiff, after due, was taken by him subject to all the defences and equities existing between the original parties..... *Shipp et al. vs. Stacker et al.*, 145
2. A. sold to B. a certain tract of land, and executed his bond for a conveyance. B., at the time of the purchase, promised to pay A. a part of the consideration in a day or two. In the mean time B. purchased from one H. certain notes held by him on A., who was reputed to be insolvent, and tendered these notes to A. in payment of such part of the purchase money. At the time of the purchase, B. purposely avoided saying anything to A. as to manner of making the payment, and left upon his mind the impression that he was to receive the remaining part of the consideration in money. In a suit in chancery for a specific performance of the contract, brought by B. against A., the court held, that the notes were not a good tender of such remaining part of the purchase money..... *Durrelts vs. Hook*, 374
3. Where a vendor covenants to convey to the vendee, "by a good and sufficient warranty deed," the land sold, it becomes the duty of the former to tender the deed to the latter. The vendee is not bound to demand the conveyance before his right of action accrues on the covenant..... *Barret vs. Browning*, 689

TOWN LOTS.

1. See *SHERIFF'S SALES*, 4, 5.

TRESPASS.

1. If several are sued in trespass, and some are acquitted, and others are found guilty, the latter may move for a new trial without being joined in such motion by the former; and the verdict may be set aside as to those found guilty, without affecting the validity of the finding as to the others..... *Brown vs. Burrus*, 26
2. In actions of trespass, if any damages be found for the plaintiff, he is entitled to recover costs..... *Bragg vs. Brooks*, 40
3. In an action of trespass, where the declaration contains counts under the statute and at common law, and entire damages are assessed, the damages will not be trebled, it

not appearing from the verdict that the damages were assessed on the statutory counts only.

Quere: Should not a declaration in trespass, under the statute, in order to bring the offence within its terms, aver that the defendant had no interest or right in the property taken away, and that it was on land not his own?—See Rev. Stat., 1835, title, "Trespasses," p. 612. *Lowe & Forsythe vs. Harrison*, 350

TROVER.

Plaintiff brought an action of trover against defendant for certain cord-wood taken from his land by the latter. Defendant purchased the wood at sheriff's sale on execution against one I., who, it appeared, from declarations made by some of plaintiff's witnesses, had a lease from plaintiff to cut and sell the wood. *Held*, That plaintiff could not maintain his action *Garesche vs. Boyce*, 228

USURY.

A party who has paid money or property by way of usurious interest cannot recover the amount so paid, where, upon such recovery, a part of the principal debt would remain due and unpaid *Hawkins vs. Welch*, 490

VARIANCE.

1. In action against a sheriff on his official bond, for failing to make proper return of an execution, the judgment on which the execution was issued is not the foundation of the action; therefore, a variance in the date of it will not be material. The official bond is the foundation of the action *The State, to use, &c., vs. Martin*, 102
2. Where a declaration in covenant averred that the covenant was made at the county of Ray, and the covenant offered in evidence was dated at the county of Platte, the variance was held fatal *Fields vs. Hunter*, 128
3. In an action of debt on a judgment recovered in the "County Court" of Louisa county, in the State of Virginia, the plaintiff offered in evidence the record of a judgment rendered at a "court of quarterly session" for said county.
Held, That there was no variance, it appearing from the record that the court of "quarterly session" was the "County Court," the judgment being recorded by the County Court at its quarterly session. *Chandler vs. Garr*, 428

VENDOR AND PURCHASER.

1. Although it is well settled, that a purchaser with notice of the equity of another, from one who purchased without such notice, may protect himself under the first purchaser, yet if there are suspicious circumstances attending the purchases which are unexplained, and the answer of the first purchaser is evasive, and does not respond to all the material allegations in the bill, it may be inferred that the first purchaser was not a *bona fide* purchaser, and consequently that the second purchaser was not protected under the first *Halsa vs. Halsa*, 303
2. It seems that a purchaser without notice, to be entitled to protection, must not only be so at the time of the contract or conveyance, but at the time of the payment of the purchase-money *Ibid.*

VERDICT.

1. See TRESPASS, 1.
2. See JUSTICES' COURTS, 4, 5.

WAGER.

1. A wager on the result of an election authorized by law is not within the meaning of the statute concerning "Gaming," (Rev. Stat. 1835, p. 290,) but such a wager is contrary to public policy and sound morality, and is therefore void.
Hickerson vs. Benson & Workman, 8
2. Where such a wager is lost, and the money or property has been fairly paid or delivered, action will not lie to recover back the same; but either party may rescind the contract, before the event is known on which the wager depended *Ibid.*
3. Although it is well settled, that, if one declares his dissent from an illegal wager before the event happens on which the wager depends, he may recover back his money or

- property, yet the rule must be attended with some qualifications for the prevention of fraud, as where the loss of the party may be foreseen with a moral certainty. Therefore, where A., on the 12th of November, 1840, bet with B. that W. H. H. would receive, for president of the United States, thirty electoral votes more than M. V. B., and B., on the 23d of December following, notified A. of his intention to rescind the contract, it was held, that an action to recover the property wagered could not be maintained by B. *Hickerson et al. vs. Benson et al.*, 11
4. See PLEADING, Subdivision 1, 2.
5. A. owed B. five dollars, and agreed with him that he would make it ten or nothing, on the presidential election. Held, That B. could only recover five dollars; the remainder being for a bet, was illegal, and could not be enforced. ... *Sisk vs. Evans*, 52

WARRANTY.

1. Although a general warranty of soundness will not cover a defect visible to the senses, yet the existence of a malignant disease, such as scrofula, on the slave sold, which cannot always be detected by mere inspection, is not among those visible defects, but included in a general warranty of soundness. *Thompson vs. Botts*, 710
2. When there has been a breach of warranty of a slave sold, it is not necessary to return the slave, to give a cause of action. *Ibid.*

WILLS AND TESTAMENTS.

1. Where a testator omits in his will to make a disposition of a part of his property, or where it is ambiguous upon the face of the will what disposition he intended to make of such part, parol evidence is admissible to show that the testator intended to give such part of his estate to a particular heir. *Davis vs. Davis*, 56
2. The certificate of a clerk of a court of record, that "the foregoing contains a true and perfect copy of the last will and testament of Joseph Dial, deceased, and the record of probate remains in my office," is defective: it should have stated, "and of the record of probate remaining in my office;" it being not only necessary to set out a "true and perfect copy" of the will, but of the record of probate also.
Bright et al. vs. White, 421
3. Upon a trial, for the purpose of determining the validity of a will, where several of the devisees are made defendants, the declarations of one of the defendants as to the state of mind of the devisor, at the time of making the will, may be given in evidence against all the defendants. *Armstrong vs. Farrar*, 627

WITNESSES.

1. See EVIDENCE, 1, 2, 3, 25, 26.
2. A party possessing a community of interest in the subject-matter, is, nevertheless, a competent witness, unless the record of the judgment would be evidence for or against him. *Cason, administrator, vs. White*, 216
3. Where a witness residing in another State is here compelled to enter into recognizance for his appearance as a witness before the courts of this State, he will be allowed mileage from his place of residence. *Hutchins vs. The State*, 288
4. The word "respectable," used in the 31st section of the act of February 27, 1843, concerning "Costs in criminal cases," is equivalent to the phrase, "credible disinterested," as used in the 17th section of the fifth article of the act of March 21, 1835, concerning practice and proceedings in criminal cases, (where application is made for a change of venue in a criminal case,) and they are each synonymous with the word competent. Therefore, a respectable or credible disinterested witness, means, in both acts, a competent witness. *Freleigh vs. The State*, 606
5. All persons who are disinterested, and not infamous, are competent witnesses, and are presumed to be so until the contrary appears. *Ibid.*
6. See CRIMINAL PRACTICE, 15.
7. The inhabitants of a corporate town are competent witnesses for the corporation, in a suit brought by the town, and in which the rights of the town are in controversy.
Barada vs. Inhabitants of Carondelet, 644



WRITS.

Where process may be served by leaving a copy of the summons "at the usual place of abode" of the party, with some white member of his family "above the age of fifteen years," a return that the copy was left "at the dwelling-house" of the party, "with his wife," and the same read to her, is insufficient. The law will not presume that "the dwelling-house" of the party was his "usual place of abode," nor that his wife was "above the age of fifteen years." *Ser vs. Bobst*, 506

WRITS OF ERROR.

A writ of error will not lie on the judgment of the court overruling a demurrer. A final judgment on the demurrer must also be rendered. *Palmer vs. Crane*, 61

